Digital Broadcasting: Review of Regulation

VOLUME TWO | *Discussion Paper*

New Zealand Government
Te Kāwanatanga o Aotearoa

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INTRODUCTION

As outlined in Volume One of this report, the audio-visual communications sector world-wide is undergoing wide-ranging change and significant upheaval, driven by digital technology developments and new patterns of consumer behaviour. New digital technology is encouraging increased convergence between the traditionally separate businesses of broadcasting and telecommunications (including the internet), as broadcasting-like content can be delivered now across numerous platforms. Improvements in broadband, together with the availability of devices such as hard-drive video recorders, put consumers increasingly in control of when and how they access, watch, manipulate and even create broadcasting content.

These changes are having an impact on the traditional business models for both the broadcasting and telecommunications sectors in New Zealand. They are changing the competitive relationships within the market, and will affect the creation, availability and accessibility of locally-produced and public service broadcasting content.

This discussion paper asks a number of questions about the implications of these changes for New Zealand:

- whether there are any threats to an effective broadcasting and telecommunications market and to the creation and distribution of diverse content;
- what level of regulatory change, if any, might be justified in response to perceived threats;
- what specific actions might be considered by policy-makers.

Your response to this paper will help the government to develop future options for New Zealand's regulation in broadcasting and related media. Some of the specific questions may require a level of specialist industry knowledge, and are optional. While your views on the workability of specific measures are sought, there is no implied intention to introduce any particular measure. Feedback provided at this stage will assist the design of any subsequent detailed proposals. Further consultation will be held should any changes to the regime be proposed.

BACKGROUND

In May 2006, Cabinet made a number of decisions in support of the launch of free-to-air digital television, and the eventual switching-off of analogue signals. In doing so, Cabinet also "directed officials to review regulatory issues relevant to a new digital broadcasting environment, and to report back to Cabinet Policy Committee with recommendations by June 2007".

Traditionally, broadcasting, film, telecommunications and the internet have been regulated separately, both in New Zealand and internationally. In the future, however, the main business distinctions are likely to be between content

creation/provision and content aggregation/delivery. This has led governments, such as those of the UK and Australia, to review regulatory structures to ensure better alignment between these technologies.

In requesting a review of regulation, Cabinet noted that it would not be undertaken with an implied *intention* to make changes, and that some objectives might be achievable through industry self-regulation or co-operation.

The review began in December 2006, after arrangements for the launch of free-to-air digital television had been finalised. The Ministers of Broadcasting and Communications approved terms of reference for the review in May 2007, and the document was posted on the Ministry for Culture and Heritage and the Ministry of Economic Development websites. A copy of the terms of reference is attached to this paper as Annex Four.

The review is a joint project between the Ministry for Culture and Heritage and the Ministry of Economic Development. It assesses relevant regulatory issues under the broad headings of **competition, standards** and **copyright**, and at three main points in the broadcasting value chain: **content, distribution and networks**.

The review is being undertaken in four phases:

- Preliminary research and identification of issues for discussion: A two-volume report "*Digital Broadcasting: Review of Regulation. The implications for regulatory policy of the convergence between broadcasting, telecommunications and the internet*" has been released, and can be viewed on both Ministries' websites: www.mch.govt.nz and www.med.govt.nz. This paper is Volume Two of that report, and sets out possible regulatory options as a guide for stakeholder consultation.
- Stakeholder consultation: The initial consultation phase of the review is to take place between January and April 2008.
- Report-back and design of options: the Ministers of Broadcasting and Communications are to report on the outcome of consultation, with recommended actions, by July 2008. If it is determined that changes to the regime are warranted, a detailed option or options will be prepared for discussion.
- Further consultation: A second round of consultation on any recommendations for change would then be held, at a time to be determined.

NOTES TO GUIDE READERS

It is important to emphasise that regulatory change does not necessarily imply an increased regulatory burden. Options for changing the regulatory framework may, in fact, reduce both the burden to business and the costs to taxpayers, by streamlining separate agencies.

As the terms of reference noted, a number of intervention mechanisms can be used to achieve the desired economic and cultural or social outcomes. They include the following tools:

- **public ownership**: government can maintain businesses in public ownership and deliver certain services itself;
- **industry regulation**: government can use coercive powers, or the threat of regulation, to influence market behaviour ;
- **conditional support**: government can apply conditions to any offers of support as a means of modifying market behaviour; or
- **incentives**: government can use incentives to encourage co-operation within and between relevant industry sectors.

The most appropriate response to the changing environment may be a combination of such interventions. This paper puts forward some possible options for discussion under the "industry regulation" heading, but alternative measures may also be identified. This paper sets out three broad approaches which illustrate the various possibilities.

The review also recognises that a number of regulatory decisions affecting the telecommunications sector have been taken recently, and are still being implemented. The significant changes likely to flow from this will take time to emerge. There is no intention in this review to either depart from these changes, or to take them further.

Separately from this review, Cabinet has approved recently the release of a discussion paper on the future of content regulation (standards), following research commissioned by the Broadcasting Standards Authority and the Ministry for Culture and Heritage in 2006. The content regulation paper asks for stakeholder views about whether the form and application of standards across platforms should be consistent and, if so, how this should be achieved. Several of the questions have relevance to this wider review. It is therefore intended that the stakeholder response to that discussion paper be fed into this review, and that any final decisions be taken only after both consultation processes are complete.

PRINCIPLES AND OBJECTIVES OF GOVERNMENT INTERVENTION

Governments have tended to intervene in the broadcasting and telecommunications markets in fulfilment of economic and cultural or social objectives. Broadly speaking, intervention in the telecommunications sector has focused on the provision of world-class infrastructure which is affordable and effective, primarily by ensuring effective competition. By contrast, broadcasting policy has largely dealt with content issues[1] and is motivated by cultural objectives.

[1] Exceptions to this include support for the roll-out and maintenance of analogue transmission infrastructure to remote areas, and for digital terrestrial transmission costs through Freeview.

Cabinet has agreed in principle that the objectives of any proposals for regulatory change to deal with the implications of digital broadcasting and convergence are as follows:

- ensuring **diverse platforms** (e.g. mobile, broadband, satellite, terrestrial) for the delivery of broadcasting-like content to New Zealanders;
- creating **world-class infrastructure** for economic transformation
- ensuring the operation of **effective markets** (in respect of competition, investment, the encouragement of innovation and sustainable growth);
- ensuring **accessibility and affordability** of broadcasting and broadcasting-like content and services (including the encouragement of interoperability);
- ensuring the **consistent application of standards** (promotion, protection, public safety, rights) as appropriate to delivery platforms;
- protecting **property rights**, to ensure the creation of audio-visual content is encouraged, and content is able to be exploited on fair terms;
- ensuring **personal and national security**, to deal with the rise in internet security issues (including the promotion of media literacy);
- supporting **diversity of content** (especially higher-cost and special interest programming which the market will not otherwise deliver) to foster and promote expressions of national and cultural identity; and,
- securing **public value** (encompassing cultural, educational, social and democratic value) by delivering benefits to audiences as citizens, and not simply as consumers.

Standing alongside the objectives is a set of principles, which it is intended should apply (wherever possible and appropriate) in evaluating any proposed regulatory changes. These are as follows.

- **Minimum intervention necessary**: regulatory tools chosen should be the least onerous to achieve the desired objective, have reference to relevant international requirements, and ensure an efficient, effective regime.
- **Sustainable and adaptable**: making regulatory choices that will cope with the pace of technological change in a fast-developing market.
- **Open and transparent**: to provide regulatory certainty to market players and consumers.
- **Technology neutral**: to avoid making *de facto* technology choices by the use of regulation or incentives, and to ensure innovation is not discouraged.
- **Social equity and cultural value**: to deliver benefits to all New Zealanders.

Question 1.1 Do you agree with the objectives and principles set out for the review? Please give reasons for any proposed additions or amendments to the principles and objectives.

RESEARCH REPORT: ISSUES RAISED

Volume One of this report: *Digital Broadcasting: Review of Regulation (The implications for regulatory policy of the convergence between broadcasting, telecommunications and the internet)* reviews the current market and regulatory environment in New Zealand and examines international market trends and regulatory responses.

It develops four plausible future scenarios for New Zealand based on potential market and social outcomes, and identifies a "diversity" scenario as a desirable outcome. It also identifies eight threats to the achievement of this, and outlines a number of issues for consideration.

To recap, the diversity scenario in the report is described as:

> "a world with universal geographical penetration by all digital platforms, supported by high levels of digital use and literacy. Digital AV content is accessible on a technology and device neutral basis, with full interoperability across platforms and at an affordable price. All services are content driven, and there is an effective content market, competing on quality and diversity of interest.
>
> The strength of plural, effective broadcasting and telecommunications markets in the 'diversity' scenario supports a strong presence for local content that meets the needs of diverse social and cultural groups. News and information sources are diverse, accurate, balanced and relevant. There is widespread participation in democratic digital forums. This scenario assumes Analogue Switch-Off has occurred and there is significant and sustainable economic growth in the digital AV sector. This scenario...represents major digital advance, high levels of competition and investment, as well as accessible, diverse content (including interoperable devices, effective pricing etc) and high levels of media literacy".

The perceived threats to this scenario and considerations are summarised in the table below. These issues have informed the three possible broad approaches set out later in this paper. While the discussion paper has been prepared as a stand-alone document, there are cross-references between the two volumes. It is therefore recommended that interested parties read both volumes before making submissions on the questions raised.

Threats to 'Diversity' scenario	Threats	Issues for consideration
	Cross value chain issues	
1. Lack of clarity and consistency in regulation and policies	1,2,3,6	Should NZ consolidate the regulation of content, distribution and networks into a single regulator and / or consolidate the legal basis for media regulation into a single Act (itself consistent with telecoms regulation)? ...Should NZ take specific action to define and treat converging markets both in terms of competition law and other areas of jurisdictional overlap?
2. Lack of competition in relevant markets and diversity in provision (platform, content and services)	2,4	Should changes to media ownership (including cross-platform) or foreign investment rules be considered?
	2,3	Does NZ need to make any policy adjustments to encourage investment and to ensure the digital broadcasting industries are yielding optimal economic return to NZ (e.g. investment in digital content, infrastructure)?
3. Lack of investment and consequent lack of innovation in digital products and services	8	How should NZ approach its Media Literacy programme in a digital age?
	Content	
	4	How should NZ ensure availability of diverse content across all platforms- particularly local content in a variety of genres including drama, documentaries and children's?
4. Lack of local content - in terms of range, quantity and quality	1,3,6	Are NZ's rules on advertising appropriate in digital age?
	3,4	Should NZ consider changing its public service broadcasting objectives, structure, approach and / or funding (e.g. increased contestability)?
5. Rise of cybercrime	**Distribution**	
	7,8	How can the regulator ensure that disadvantaged groups are able to access digital content (e.g. regulation of broadcasters or EPGs to ensure services for the visually impaired, captioned / signed content)?
6. Inadequate protection for minors and other vulnerable groups	4,7	Should NZ consider regulating the acquisition and/or sale of content rights (e.g. consider anti-siphoning regime)?
7. Inequality of access to digital services for both rural areas and / or disadvantaged groups	1,2,4,8	Is NZ's Copyright framework understood by consumers? Does it work equally for rights holders who are individuals / small companies as it does for large, national or multi-national companies?
	2,4	Are the rights to orphan AV works and archives sufficiently accessible?
8. Significant digital illiteracy and consumer confusion	**Network**	
	1,7	How can NZ ensure the effective use of technical standards to promote fair access and competition?
	2,3	In light of the digital broadcasting network monopolies and duopolies, what, if any, open access regimes should NZ apply across different digital broadcast networks?
	2,3	What form should the post-ASO spectrum allocation regime take?

Question 2.1 Do you agree that the diversity scenario summarised above is a desirable state for New Zealand to work towards achieving?

Question 2.2 Do you agree with the threats and issues identified in the above table? Please identify any threats or issues with which you do not agree, and provide reasons.

Question 2.3 Are there any further threats and issues for consideration that you believe have not been identified?

Question 2.4 Which of the threats and issues (identified in the table or in your response to question 2.3) do you consider to be the top three priorities for action?

OPTIONS FOR DISCUSSION

This section sets out some broad approaches to the regulatory framework and regime, which could be considered in response to the threats identified in Volume One. The paper asks a series of general and specific questions, designed to help identify and prioritise any market or social issues that cannot be adequately dealt with by the existing regulatory tools, and to gauge stakeholder views on the most appropriate form of intervention in response.

In identifying possible regulatory actions, the net has been cast wide. As a result, there are some measures listed that have been explored in the past, but not pursued. This may have been because of a preference at the time for a different combination of policy tools (e.g. in the case of local content quotas), or because of long-term arrangements in place (e.g. rights to coverage of sporting events). If there is widespread stakeholder agreement that some risk areas are a priority for New Zealand, a regulatory response may merit consideration.

The measures identified reflect international regulatory trends. However, the list is not exhaustive. The exclusion of particular regulatory measures should not prevent submitters from recommending their consideration by policy-makers.

SUMMARY OF STATUS QUO

The current regulatory approach in the broadcasting and telecommunications sector in New Zealand is described in detail in Chapters 3 and 4 of *Digital Broadcasting: Review of Regulation* Volume One. Below is a brief review.

CROSS VALUE CHAIN

In general terms, the current regulatory framework for broadcasting is relatively 'light-touch'. Over time, however, and given the current trend towards convergence, it has also become quite complex. The current framework consists of a variety of legislative measures and is enforced through a number of regulatory bodies. Its origins lie in an analogue environment and so the framework does not necessarily recognise the implications of digital media growth, technology developments, changing consumer behaviour and the strengthening trend towards convergence.

The most relevant legislation is the Commerce Act (general competition policy), the Radiocommunications Act (spectrum management), Broadcasting Act (standards, local content funding), the Telecommunications Act, and the Copyright Act. In addition, each of the public broadcasters has its own legislation.

Content

Under the "content" part of the value chain, intervention is focused on standards issues (through the Broadcasting Standards Authority, and the Advertising Standards Authority) and measures to ensure the production, broadcast and archiving of public service (including local) content. Support for local content is allocated through Crown entities (NZ On Air, Te Māngai Pāho, Creative NZ etc). The social and cultural obligations of public broadcasters are enshrined in legislation (Television New Zealand and Radio New Zealand – with Charters – and Māori Television Service) or in establishment documents (NiuFM). Some archiving is supported with public funding (Film Archive, Radio New Zealand Sound Archive).

Distribution

There is currently minimal intervention in New Zealand at the "distribution" part of the value chain, which deals with the availability of content to network and platform operators, and the prevention of monopolies in content supply. Issues of media plurality and protecting property rights are also relevant. There is a reliance on general competition policy to ensure the effective operation of markets, and copyright legislation to protect intellectual property rights.

Networks

In the area of "networks", too, there is strong reliance on the operation of markets. The government takes responsibility for spectrum policy and management, and the Freeview consortium has received government support on the condition that it operates an open, not-for-profit platform. New Zealand is, however, currently implementing a number of reforms in its telecommunications regulation, in an attempt to encourage further competition and investment. These include the introduction of Local Loop Unbundling (LLU), the provisions for Naked DSL, and the operational separation of Telecom New Zealand. These developments in the telecommunications markets may have a significant impact on, and encourage growth in, 'broadcasting-like' services delivered via broadband and mobile.

MAINTAINING THE STATUS QUO

A first option is to retain the status quo. The advantages of doing so include the following.

- New Zealand's light-handed approach to regulation is viewed positively in international markets, a number of which are moving towards less sector-specific regulation and more reliance on general competition policies and subsidies to achieve economic and social objectives.

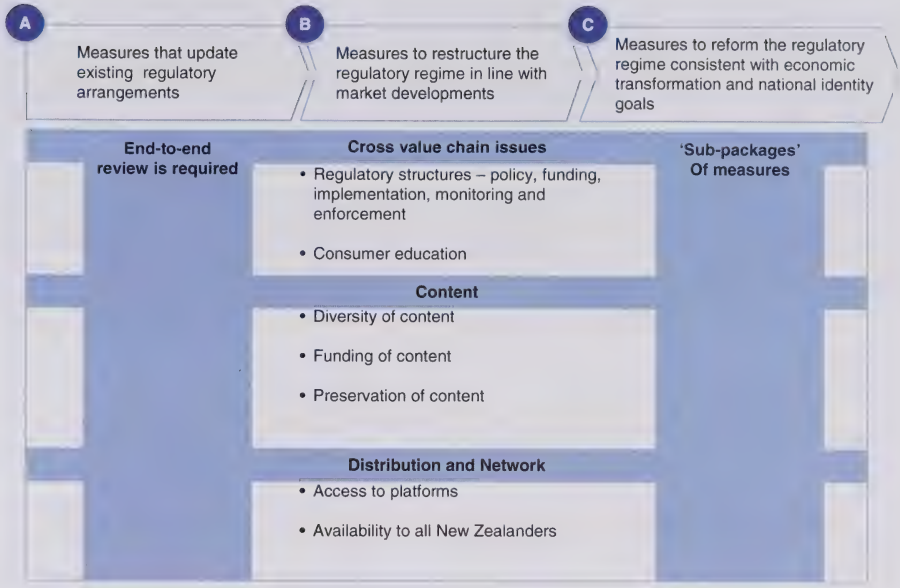
- There may be advantages in having a number of agencies with overlapping responsibilities, such as multiple "touch points" and greater contestability of views or advice.

In the absence of regulatory change, however, the research report – together with the high-level stakeholder views on market and technology developments which informed it – highlights particular concerns that:

- multiple agencies may result in a fragmented approach to regulation that does not take account of increasing convergence;
- the business case for significant investment in broadband infrastructure is marginal;
- the production and dissemination of certain genres of local programmes (especially drama, documentaries and children's programmes) will be threatened increasingly as platforms and providers multiply and audiences further fragment;
- the ability to trade in content will be compromised if appropriate understandings on the value of Intellectual Property Rights, and appropriate digital rights management tools, are not reached, and if there is limited public understanding of copyright issues;
- the availability of certain types of premium content (including events of national significance) will be restricted if "bundling" and/or long-term exclusive deals crowd less powerful players out of these markets; and
- vertically integrated business entities may dominate the market in each sector.

CHANGE ACROSS THE REGULATORY SPECTRUM

The issues identified in the report are interdependent, and need to be considered within a coherent structure. For the purposes of discussion, three broad approaches – consistent with change at three main points along the regulatory spectrum – have been shaped. The first package of measures (approach "A") largely deals with updating existing arrangements, as a result of change in the broadcasting and telecommunications sectors. It would instigate some reviews to address specific issues. The second and third packages (approaches "B" and "C") restructure and reform the framework respectively, and would be accompanied by a set of specific measures relevant to different points on the value chain, and to the degree of restructure or reform implied at the "macro" level. This is illustrated below.


A
Measures that update existing regulatory arrangements
B
Measures to restructure the regulatory regime in line with market developments
C
Measures to reform the regulatory regime consistent with economic transformation and national identity goals
End-to-end review is required
Cross value chain issues
• Regulatory structures – policy, funding, implementation, monitoring and enforcement
• Consumer education
Content
• Diversity of content
• Funding of content
• Preservation of content
Distribution and Network
• Access to platforms
• Availability to all New Zealanders
'Sub-packages' Of measures

Source: Spectrum Value Partners analysis

The following table explains the rationale for the different approaches, and illustrates what they might imply in practice[2].

Level of change required

	A Update existing regulatory arrangements	B Restructure the regime in line with market developments	C Reform the regime, consistent with economic transformation and national identity goals
Key aim	• Ensure that existing regulation is **consistent and up-to-date** across platforms	• Building on Package A, introduce an additional set of measures to **restructure and refresh the regulatory framework**, in line with market changes	• Building on packages A and B, introduce a **set of measures to counter specific threats** to the diversity and availability of digital media in the NZ market[2]
Rationale[1]	• As the market has developed, a number of **regulations may have become outdated** - e.g., online content now has a considerable impact and reach, but the regulation of the broadband marketplace does not always reflect this development - e.g., 'broadcasting' is defined in a narrow linear programming sense • These need to be reviewed and refreshed	• **Markets have converged** as 'content' providers deliver product across platforms and 'telecoms' providers increasingly distribute (and even originate) 'media' products and services - e.g., linear ('broadcast') television programming can now be distributed via terrestrial, satellite, cable, wireless (mobile) or wired (broadband) platforms - e.g. single properties (Shortland Street of a beer ad) may now be 'repurposed' for presentation across platforms • These 'converging' markets need to be regulated consistently	• **A number of specific market risks exist** that would result in the New Zealand market developing towards a sub-optimal market structure, characterised by lack of competition and / or diversity: - e.g., the market could concentrate down to just a few players, reducing choice - e.g., a divide could open between services / prices available in metropolitan and rural areas - e.g. overseas produced content could come to dominate the digital media environment • Government should act to counter these risks if it can
General scope	• **Update regulatory settings** to reflect changing technology and market conditions, removing inconsistencies and correcting existing regulatory anomalies (reflecting the principle of minimal intervention)	• **Restructure and refresh the regime, reflecting** the convergence between the media and telecoms sectors; in particular, look to **merge and / or re-scope regulatory bodies and agencies**	• **Adopt more positive / pro-active regulatory measures** to counter specific risks and threats to the industry - consider such measures across regulatory structures, content, platform and network regulation

Note: (2) The "Diversity" scenario, identified in the Research Paper
Source: (1) The Research Paper; Spectrum Value Partners analysis

[2] Note that references to ACMA and to Ofcom in the following tables are to the "Australian Communications and Media Authority" and to the UK "Office of Communications" respectively. Case studies on these two regulatory bodies are included later in the paper.

Question 3.1 Should New Zealand maintain the *status quo* in all respects? If so, why? If not, what are the priority areas for change?

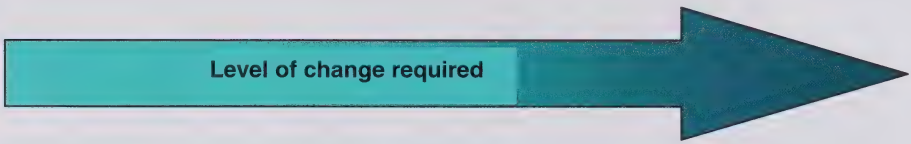
Question 3.2 If some change is necessary, should this generally be at the level of (a) updating existing arrangements, (b) restructuring the regime in line with market developments, or (c) reforming the regime? Please give reasons for your views.

FOCUS FOR DISCUSSION

(A) REGULATORY FRAMEWORK: CROSS-VALUE CHAIN ISSUES

A number of important issues run across the content, distribution and network parts of the value chain. These include the co-ordination of various aspects of regulation, the appropriateness of media ownership rules in a digital age, encouraging investment in the industry and its infrastructure, and the development of a national Media Literacy programme.

Potential actions at points on the regulatory reform continuum



Examples of specific actions	(A) Updating existing arrangements	(B) Examples of restructuring the regime	(C) Examples of reform of the regime
Cross value chain	• Re-define functions of broadcast and other relevant agencies • Review definition of broadcasting to ensure consistency with digital platforms • Consider extension of the role of 'Telecoms Commissioner' to include media markets including responsibilities such as relevant market definition	• Create a single (ACMA style) regulator (to cover telecoms and media) to administer current legislation, i.e. o put existing regulatory bodies under a single organisational structure o the regulator would take on Spectrum Management regulatory role from MED • Introduce and manage a Media literacy programme • Further extend (over Package A) the Telecoms Commissioner's role to include maintaining media plurality	• Put in place a single Telecoms and Media Act • Allocate additional relevant roles and responsibilities to the single (now Ofcom style) regulator, e.g. o monitor / benchmark PSB (not policy) from MCH o the administration of any TSO, pricing, access and plurality regimes (taking over the specialist role of the Telecoms Commissioner granted by the Telecommunications Act) … o but leave general competition policy responsibility with the Commerce Commission

			(under Commerce and Fair Trading Acts) • Implement specific media concentration rules that set limits in order to ensure media diversity • Develop a digital media 'wholesale' regime that requires providers, aggregators and distributors to work with new entrants across the value chain and that prevents 'hoarding' of content assets

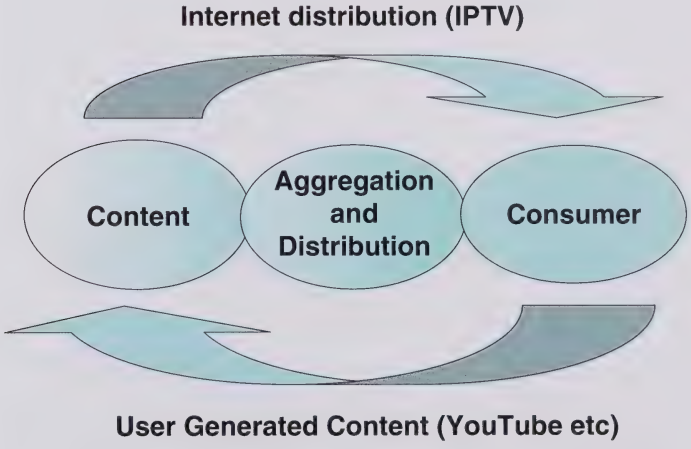
Background: current regulatory situation in New Zealand

As noted in Volume One (Chapter 4), 'Overview of the current regulatory environment', New Zealand's broadcasting value chain is currently subject to a range of legislative provisions and regulatory bodies.

Broadcast-specific legislation and regulation in New Zealand is generally focused on the production of content, with its distribution and networks subject to more generic competition and fair trading rules.

Why is this issue important?

The development of technology, new forms of content and changing consumer behaviour have led to new relationships in the value chain. The distinctions between different activities in the value chain are therefore becoming blurred as summarised in the diagram below.



These changes in the broadcasting value chain risk a potential overlap in existing regulatory measures that may cause confusion and/or contradiction between different regulations currently issued. Such confusion could deter investment and create an unnecessarily burdensome regulatory framework for the industry.

Key industry players have expressed concern that regulatory uncertainty or lack of clarity could act as a significant factor in destabilising an already fragile competitive environment. The establishment of a single regulator is seen by a number as the preferred solution, however.

Stakeholders generally agree on the need for clarity on the jurisdiction of all relevant regulatory bodies. The collation of cross-market / value chain research is also widely regarded to be a valuable asset, not currently being fully provided under the current regulatory structure.

What regulatory response has been adopted by different regulators?

The "re-structure" option could deliver a similar outcome to Australia, which has recently established a *converged* regulator. The Australian Communications and Media Authority (ACMA) is a statutory authority within the federal government portfolio of Broadband, Communications and the Digital Economy (formerly the Department of Communications, Information Technology and the Arts [DCITA]). Its legislative framework is relatively complex, and is based on four Acts of Parliament, 29 statutes and more than 523 legislative instruments[3].

As discussed in Volume One (chapter 6), a number of European member states have now formed *single* regulatory authorities for communications and broadcasting, which generally function as independent bodies. The "reform" option above might provide a framework similar to the UK, where the combined regulator Ofcom was established at arms-length from government and its remit was largely established within a single Act. Ofcom's duties range from ensuring spectrum efficiency and maintaining diversity and quality in broadcasting, through to ensuring universal access of electronic communications services.

What are some regulatory options?

- **Maintain** the status quo.

Update Existing Arrangements (Approach A)

- **Extend** the role of the Broadcasting Standards Authority, for example, to deal with content standards across platforms, and extend the role of the Telecommunications Commissioner to include relevant aspects of media.

Restructure (Approach B)

- **Create a converged regulator,** to deal with, for example, cross-platform content standards, a media literacy programme, setting public service broadcasting benchmarks and monitoring performance (note that this latter role is currently with the Ministry for Culture and Heritage). Further extend the role of the Communications Commissioner (i.e. Telecommunications Commissioner re-named, to reflect the converged role), for example with

[3] *The Legal Challenges Facing ACMA as a Regulator*, Chris Chapman (Chair to the AGS Media and Communications Forum), March 2007

responsibility for spectrum management (from the Ministry of Economic Development). Ministries to maintain their policy advice role, however.

Reform (Approach C)

- **Create a single regulator** which further extends the converged regulator above by including the Communications Commissioner role (as prescribed under relevant legislation such as the Telecommunications Act), for example, but leave general competition provisions with the Commerce Commission (under the Commerce and Fair Trading Acts).

Question 4.1 Should New Zealand consider one of the three options for revised institutional arrangements (reflecting different levels of change along the regulatory spectrum)? If so, which one, and why?

Specific Role and Responsibilities of a Converged or Single Regulator

The range of responsibilities given to a converged or single regulator in other markets varies. Responsibility for content standards appears to be a core function of most regulators. Additional functions could include:

- media literacy and internet safety (c.f. ACMA in Australia);
- spectrum (or broadcaster) licensing (c.f. ACMA, Ofcom in the UK);
- access to broadcasting facilities or platforms (in the past, this was typically the role of a telecommunications regulator, but is now the responsibility of converged regulators in the UK and other European Union countries);
- advertising regulations (in other countries this may be a responsibility of the regulator, or of an independent industry body).

In more general terms, there are a number of functions for which a regulator may be given responsibility. These may include: some policy responsibilities, consistent with the overall regulatory framework within which it operates; policy implementation; enforcement; funding (to influence market behaviour); and monitoring. This also raises questions about remedies that might be available to deal with compliance breaches, and how monitoring should be carried out (e.g., regular market overviews, compulsory reports from industry, and/or response to complaints only).

Note: A converged regulatory approach would mean (a) an extended role for the Broadcasting Standards Authority (to play a stronger role in promoting Media Literacy, for example) and (b) an extended role for the Telecommunications Commissioner (re-named the Communications Commissioner), to deal with relevant competition-related issues in both broadcasting and telecommunications.

A single regulator would be established through a single Act. It would, in effect, combine the functions of the Communications Commissioner with the extended Broadcasting Standards Authority as an independent body, and may further extend the regulator's role to include, for example, spectrum allocation.

Additional case study information on converged and single regulators is included in Annex Two of this discussion paper.

Question 4.2 Which of the above roles would fit appropriately within the responsibilities of *converged* regulators? Of a *single* regulator?

Question 4.3 Would it be appropriate for a *single* regulator to have both economic (e.g. competition) and cultural (e.g. standards) responsibilities?

Question 4.4 If Approach A were adopted in preference to a converged or single regulator, should an extended Broadcasting Standards Authority and Telecommunications Commissioner have any additional roles and responsibilities? Should the Commissioner, for example, include regular market reviews as input to competition determinations made by the Commerce Commission?

SINGLE REGULATOR: RELATIONSHIPS AND INTERACTION WITH COMMERCE COMMISSION

The option of a single regulator would accompany a "regulatory reform" approach. As set out in the table on page 10 above, this reform would be likely to involve the passage of new legislation (a single Act), and would be accompanied by the introduction of some combination of the specific measures used to illustrate package C. As noted in the table, this approach could be considered as a response to a set of identified threats to the diversity and availability of digital media in New Zealand.

A single regulator would take on some functions relevant to competition in the telecommunications and broadcasting sector, since the current/expanded Telecommunications Commissioner role would be replaced by the single regulator. This means that the single regulator would take on those responsibilities established through sector-specific legislation (i.e the Broadcasting Act, Telecommunications Act and/or Radio-communications Act, or their replacement by a new, single Act). General competition functions created through the Commerce Act and the Fair Trading Act, however, would remain with the Commerce Commission. The

establishment of a single regulator would therefore raise important questions about its interaction with the Commerce Commission.

See also the case studies in Annex Two for additional information on the relationships between regulators in other jurisdictions.

Question 4.5 How could the relationship between a single regulator and the Commerce Commission best be defined and managed? For example, should the regulator have primacy and then 'refer' issues to the Commerce Commission? Would the two be required to work together on all competition matters? Or, would they each be free to investigate potential issues / breaches as they saw fit?

Question 4.6 Some overlap of responsibilities does exist in other countries, such as the US and the UK. Should such overlap be contemplated if a single regulator were established? If so, how might it be made workable?

Market Definition and Cross-Media Ownership

Why is this issue important?

The successful operation of competition law relies upon appropriate definitions of markets. Competition law can then act against any market behaviour that would unfairly prejudice other market players or act against the interests of consumers. The converging media landscape and the speed of change create new challenges for competition authorities in effectively monitoring and responding to change across the broadcast value chain.

The regulatory environment of New Zealand is notable for having no foreign and cross-media ownership laws. This approach and its small market size has led to markets in New Zealand characterised by the dominance of a few overseas players and a small number of domestic players. The digital transition is encouraging the trend in further vertical or horizontal integration across the market.

Due to the relative high risk and market costs, major multinational players are arguably often better placed than their New Zealand equivalents (Crown-owned companies or smaller, New Zealand-owned companies) to invest in emerging distribution methods or rights packages. Multi-nationals also tend to be able to sustain losses over a longer period by, at least in the short to mid-term, offsetting losses against more profitable interests overseas. The trend in foreign ownership and consolidation may therefore be the best source of sustainable investment in New Zealand's broadcasting markets.

The current trend in foreign ownership may also, however, limit the potential for creative industries to contribute to economic transformation and to develop a 'knowledge economy'. There are also public policy concerns around ensuring consumers have sufficient range and choice in media content, including access to new platforms and premium content.

The current approach to cross-media ownership means that major shareholders in a broadcaster can buy a controlling share of another media business, such as an internet service provider (ISP) or newspaper business. This raises specific concerns about whether this might lead to a significant reduction in the provision of news from diverse sources, which is widely considered a basic requirement in an advanced, democratic society.

A number of stakeholders consider the current trends in media ownership to be a necessary consequence of the nature and size of New Zealand media markets. There is also a view that, given the likely negative impact of any extended controls on investment in New Zealand media, particularly at a time when Australia and other countries are loosening their controls, the focus of government should be on incentives and the more general effective operation of competition.

Industry stakeholders would be concerned that any additional regulatory burden may close down emerging markets or further discourage investment in New Zealand media.

What regulatory response has been adopted by different regulators?

Convergence and the diversification of media companies have led overseas policy-makers to focus the debate on the appropriate definition of 'broadcasting' in a digital age. The European Commission and Parliament have gone through significant consultation and discussion on the definition of 'broadcasting-like' media on a technology neutral basis as a key element in the European Union's revised broadcasting regulatory framework, the Television Without Frontiers (TVWF) directive. In considering regulatory options, policy-makers have been conscious that taking an approach that is *too* 'converged' risks the creation of unnecessary regulatory burdens for some new and emerging media, which may impede their development and competition. The cost and practicality of extended regulatory powers over these new media may also be prohibitive.

The purpose of media ownership rules is generally to promote competition, diversity of viewpoint, and the availability of local news and information. In general, legislative controls on media ownership can be divided into two broad categories: specific controls relating to broadcasting alone and generic controls relating to commercial activity and the operation of competition. The majority of single regulatory authorities, including ACMA and the Federal Communications Commission (FCC), are required to conduct regular reviews of media ownership rules. This has led to considerable recent debate on the effectiveness of cross-media rules in a converging digital media landscape, and has led to reform of some aspects of the rules in Australia.

Currently, the Australian regulator ACMA works in close co-operation with the Australian Competition and Consumer Commission (ACCC) to administer the rules on the concentration of ownership within broadcasting sectors, ownership across different media, and foreign ownership. The rules apply to licences for commercial

television and radio broadcasting, subscription television broadcasting, international broadcasting, datacasting transmitters and newspapers. If similar rules were to be introduced in New Zealand, the existing spectrum licensing regime would have to be revised to enable such conditions to be introduced (see also the discussion under "Network Issues" on page 40).

In Europe, the media ownership rules are largely dealt with at Member State level, but the European Commission also ensures that national rules do not hinder the functioning of the internal Market. The acquisition of control of a media entity may fall beyond the scope of Member State rules and into the concentration regime of the European Commission Merger Regulation (provided it meets certain dimension thresholds).

Both the Australian and the European Union regulatory frameworks include some form of anti-siphoning rules (addressed later in this discussion paper), in order to promote the distribution of content considered to be of national significance to a mass audience.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Widen the relevant legislative definition of broadcasting to include all 'broadcasting-like' media or make specific provisions for 'broadcasting-like' content and its distribution (note that Parliament is currently considering an amendment to the Broadcasting Act in this respect).

Restructure (Approach B)

- Strengthen the powers of the Commerce Commission, for example by extending the powers of the Commissioner to include broadcasting and establishing a role in monitoring and investigating key trends in converging media markets.

Reform (Approach C)

- Review the definition and treatment of converging markets (vertical and horizontal integration) both in terms of competition law and other areas of jurisdictional overlap
- Introduce some forms of media ownership (including cross-platform and/or foreign investment) rules to ensure plurality of news/other key genre provision.

These options are not necessarily exhaustive or mutually exclusive.

Question 4.7 Which of the options for dealing with market definitions should be considered in New Zealand? Please give reasons for your views.

Question 4.8 Should changes to media ownership (including cross-platform or foreign investment) rules be considered to ensure plurality of news/key genre provision?

MEDIA LITERACY

Background: current regulatory situation in New Zealand

There is no national, co-ordinated media literacy programme in New Zealand although there is some activity in the formal education sector (focused on schools or adult skills) and a media literacy website managed by the New Zealand School of Broadcasting in partnership with the Advertising Standards Authority, the Broadcasting Standards Authority and the Families Commission. There is no centralised research or monitoring of issues around media literacy, and no industry or government lead in quality benchmarking.

Why is this issue important?

A key aspect of securing market development in line with the 'Diversity' scenario is ensuring that New Zealanders are equipped with the tools to source, consume and manage their media choices effectively. Media literacy can help secure both economic and public policy objectives in the digital transition.

Media literacy also has an impact on issues around effective rights management. Ensuring consumers have sufficient awareness and understanding of copyright law is an important aspect of protecting the value of digital content and the related industries, particularly given the opportunities to use and share digital content over the internet.

What regulatory response has been adopted by different regulators?

Media literacy is a relatively recent term and policy objective. The UK regulator defines it as ensuring that the public can 'access, understand and create media in a variety of contexts'[4].

In Europe, the European Commission has recently launched a European Union-wide survey of best practices in media literacy to cultivate and improve media literacy in the digital age. In the UK, which has the highest take-up of digital broadcasting in Europe, Ofcom is charged in its founding legislation with promoting media literacy. The regulator therefore leads a research programme, stimulates debate and activity by stakeholders, and works with industry to establish a framework for labelling standards. Also, in the UK, the BBC's Royal Charter obliges the broadcaster to use its public resources to drive a digital Britain and provide a standard in digital media excellence, available to all.

In the US, media literacy has emerged as a key dimension of the regulatory approach. For example, consumer empowerment technology such as GetNetWise has enhanced consumer awareness about the issues and dangers surrounding usage of internet content.

What are some regulatory options?

- Maintain the status quo.

[4] Ofcom's definition of Media Literacy resulting from its 2004 public consultation

Restructure (Approach B)

- Review and strengthen provisions promoting internet safety and guarding against the exploitation of minors. This might form part of a media literacy programme.
- Task/encourage industry to lead a programme of media literacy.

Reform (Approach C)

- Government to lead and invest in a coordinated programme of media literacy (See also the options for amending institutional arrangements, and possible role for a converged or single regulator [pp.12-17]).

Question 4.9 Should New Zealand establish a national, coordinated media literacy programme? If so, what form should it take, and who should be responsible for its implementation?

Question 4.10 To what extent would it be appropriate for a media literacy programme to address issues of internet safety?

(B) CONTENT ISSUES

The review has also identified a number of questions relevant to each specific stage in the value chain. In terms of content, the key issues for consideration are: availability of content across all platforms; regulation of advertising; and issues around public service content. This section is also concerned with ensuring that the content created and provided to viewers or listeners continues to meet societal standards, with adequate redress available.

Potential actions at points on the regulatory reform continuum

Examples of specific actions	(A) Updating existing arrangements	(B) Examples of restructuring the regime	(C) Examples of reform of the regime
Content	• Align content regulation across relevant bodies (BSA, censor's office) • Ensure content standards are applied consistently across new platforms • Ensure consistent treatment of advertising / commercial messages	• Focus on restructuring PSB funding: o review scope of PSB in a digital age o review means to ensure sufficient investment in PSB content across platforms o introduce new, aligned conditions of funding for	• Targeted initiatives to preserve local content and flavour and PSB content in digital markets, e.g. o Extend contestable PSB funding to all platforms and content types; and / or o Review provision of direct funding; and / or

	• Allow funding for broadcast programming on new platforms.	local and PSB content.	○ … introduce a single content funding body as a means of promoting greater contestability, effectiveness and transparency; and / or ○ consider the creation of a digital media transformation fund to protect NZ content as digital media proliferate.

STANDARDS

Why is this issue important?

Digital technology has seen the development of a number of delivery platforms, with the result that the same or similar broadcasting-like content can be transmitted or published in many different ways. Currently, a number of bodies deal with aspects of content standards (the Broadcasting Standards Authority, the Advertising Standards Authority, the Office of Film and Literature Classification, the Press Council) and the approach to standards-setting and compliance varies. The same content may therefore be subject to different regimes (or no regulation) depending on the mode of delivery.

It should be noted that work has already been undertaken separately on the future of content regulation (standards), and a public consultation process has begun with the release of the discussion paper *Broadcasting and New Digital Media: Future of Content Regulation*. This paper asks questions concerning the desirable future scope of content regulation, the range of functions that may be appropriate for a content regulator beyond the adjudication of complaints, and the statutory concepts which should underlie the content standards regime. It does not enquire about or presuppose any view about the most appropriate future institutional structure for content regulation.

The current discussion paper does not duplicate the content regulation consultation exercise, but asks a related general question about the regulatory structure for dealing with content standards. **In considering this question, you may wish to refer to the issues raised in the discussion paper *Broadcasting and New Digital Media: Future of Content Regulation* [posted on www.mch.govt.nz].** The outcome of the separate consultation exercise will be taken into account in the next phase of this review.

Question 5.1 To what extent would it be appropriate for administration of the separate content standards functions of the Broadcasting Standards Authority, the Advertising Standards Authority, the Office of Film and Literature Classification and the Press Council, as they relate to broadcasting-like content, to be amalgamated within a single body?

Content Diversity

Background: current regulatory situation in New Zealand

A key way governments can protect a commitment to New Zealand audiences is by ownership of public broadcasters that have statutory responsibilities to meet the needs of citizens. A variety of funding mechanisms also support content creation in New Zealand: some funding is provided direct to the public broadcasters – Māori Television Service, Television New Zealand, Radio New Zealand, and the National Pacific Radio Trust (NiuFM and Radio 531 pi) – and some funding is provided on a contestable basis for individual programmes commissioned by a free-to-air broadcaster. This funding model is managed through a number of agencies (NZ On Air, Te Māngai Pāho), with the Ministry for Culture and Heritage and Te Puni Kōkiri leading its policy development.

A number of stakeholders have expressed great concern over the future of local content in New Zealand. There is a view that the production and broadcast of local content is often unprofitable and faces growing competition from the influx of cheaper US and UK productions. It is believed that the economics of local production are likely to become increasingly challenging.

Stakeholders believe the growth in content available via the internet creates both threats and opportunities. The technology is available for consumers to source whole channels or select specific content directly from abroad, thereby by-passing domestic broadcasts and significantly reducing the profile of local content. At the same time, broadband – as a new distribution platform – can present real growth opportunities for local content, helping broadcasters and content creators to reach new audiences, build new relationships with their audiences and extend the value of archived or old content.

Stakeholders have suggested a number of measures to protect local production, including quotas, increased subsidy, incentives and must carry/pay rules.

Why is this issue important?

In a digital environment, the proliferation of media choices and audience fragmentation make the economics of local content production and distribution more challenging. While digital media may increase the availability of a range of content, particularly archived and overseas content, it also threatens high-end local production (such as children's programming, drama and documentaries). Such genres are more expensive to produce, and are therefore considered a greater risk by commissioning broadcasters, who are focused on shoring up a mass audience in response to the competitive threat posed by multiple platforms and channels. Overseas content in these genres can often be readily acquired at a significantly lower cost than commissioning a locally-produced equivalent. As broadband capacity improves, overseas suppliers are also more likely to deliver premium content (movies and drama series) directly to end-users, by-passing traditional distribution channels.

Content producers and broadcasters may therefore prefer to focus on more popular (and cheaper to produce) content such as quiz shows and reality TV[5]. The increasingly competitive environment of digital broadcasting also puts pressure on the sustainability of producing less popular or niche genres such as current affairs and the arts. These trends pose significant threats to achieving public policy outcomes through broadcasting and developing domestic markets in line with the 'Diversity' scenario.

NZ On Air's recent research highlights that locally produced content is highly valued by audiences: 79% of New Zealanders agreed that 'seeing ourselves on television and hearing our stories on radio helps to develop our cultural identity'. This sentiment was felt even more strongly amongst the survey's Māori sample, in which 83% agreed with the statement. Even when aware of relative costs with imported content, 78% of respondents believed that free-to-air TV should be made to screen a set amount of New Zealand-made programmes.[6]

Industry regulation is one option for dealing with a perceived threat to content diversity. Possibilities are outlined for discussion within the following section on distribution. The alternative forms of intervention to ensure content diversity illustrated below – representing either restructuring or reform in line with the cross-value chain options – suggest ways in which the implications of convergence and audience fragmentation could be tackled through funding policies.

What regulatory response has been adopted by different regulators?

Globally, a number of regulators have put in place quotas on certain types of content (e.g. local and independent productions) and introduced content obligations into broadcast licences. However, these regulations still tend to apply to traditional broadcasting platforms only: for example, the recent review of the TVWF directive[7] extended a number of broadcasting rules to the new platforms (mobile and online), but did not extend obligations for content diversity to these platforms.

International regulators have reviewed the New Zealand contestable funding model and many see it as an effective policy tool (minimising market distortion and encouraging competition for quality) for funding local and public service content. The UK, for example, is considering adopting an element of contestability in public funding in the form of a Public Service Publisher, proposed by Ofcom. Ofcom's concept of the Public Service Publisher includes within its remit provision for content provided on broadband and mobile platforms. This is in addition to the current regime based on Public Service Broadcasters.

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[5] A recently published Ofcom report on the future of children's television programming highlights significant reductions in UK broadcasters' spending on UK-originated programming, particularly in the children's, drama and factual genres.

[6] Public Information and Opinion Monitor, conducted by TNS for NZ On Air 2006

[7] The European Union Television Without Frontiers directive is discussed in greater detail in Volume One: the section on the global regulatory trends

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Allow funding for broadcasting content on new platforms (note that a Bill to achieve this is already in the House).
- Review and extend the level of direct and contestable funding to the market.

Restructure (Approach B)

- Introduce mechanisms (e.g. conditional funding incentives, such as access to a pool of content funding to "reward" commissioning and scheduling performance) to ensure sufficient broadcaster or platform provider investment in local content.
- Create a digital media transformation fund to target rich-media content across multiple platforms.

Reform (Approach C)

- Establish a converged funding body to promote streamlined contestability, effectiveness and transparency.
- The converged funding body to consider introducing conditions for access to content funding, to encourage broadcaster commitment to commissioning diverse local content, and to ensure the visibility and accessibility of funded programmes.

Question 5.2 Which of the above options for change do you consider would best ensure diversity and visibility of local content in a digital age? Please give reasons for your views.

Question 5.3 Do funding bodies require any mechanisms (e.g. incentive-based or obligation-based) not currently available to them to promote diversity, maximum visibility and accessibility of funded programmes?

Question 5.4 To what extent would the blurring of boundaries between different segments of the audio-visual sector justify changes to the current structure of funding bodies (e.g. to avoid the risk of gaps or duplication)? If a converged funding body were established, what might its role be?

Question 5.5 What would be the implications of the changes you support for the amount of funding required? How could a significant commitment to private investment in local and other content of public value also be encouraged?

PUBLIC SERVICE BROADCASTING IN A DIGITAL AGE

Background: current regulatory situation in New Zealand

Fostering national identity, reflecting New Zealand to New Zealanders and to the rest of the world, is at the heart of the government's rationale for its continuing support of public service broadcasting. There has, however, been less debate in New Zealand about the value of Public Service Broadcasting (also PSB) – beyond local programming – particularly given the new challenges and opportunities of a digital age.

The Public Broadcasting Programme of Action, published in February 2005, established four cornerstone principles of broadcasting policy. These are as follows.

- **Universality**: Broadcasting must be both technically receivable and socio-economically and culturally accessible to all citizens. Services should provide for the full range of social and cultural interests.
- **Diversity:** Broadcasting should reflect the diversity of public interests in the programme genres offered, the audiences targeted, and the subjects discussed.
- **Independence:** Broadcasting should provide a credible forum where ideas are expressed freely, where information is available, where debate occurs, and where creativity is fostered.
- **Quality***:* Broadcasters' effectiveness in providing value to audiences requires innovative, original and ambitious services in terms of individual programmes, channel schedules, and the total range of programmes and services offered to audiences.

The purposes and functions of New Zealand's public broadcasters are set out in the Television New Zealand Act 2003, the Radio New Zealand Act 1995, the Māori Television Service Te Aratuku Whakaata Irirangi Māori Act 2003, and the trust deed of the National Pacific Radio Trust (NiuFM and Radio 531 pi). Responsibility for measuring elements of public service broadcasting outcomes in New Zealand is currently shared across relevant Ministries, agencies and the public broadcasters themselves. There is no equivalent to the UK's rolling reviews of public service broadcasting across the market.

The public broadcasters are funded by a mix of direct, indirect and contestable public funding, and from commercial revenues. Radio New Zealand is fully non-commercial, predominantly (90%) publicly funded from Vote Arts, Culture and Heritage, via NZ On Air. Television New Zealand, on the other hand, is approximately 90% funded out of commercial revenues, and receives direct public funding, including for its new digital services, and accesses contestable funding from NZ On Air and Te Māngai Pāho. The Māori Television Service also receives a mix of direct funding, contestable funding via Te Māngai Pāho, and commercial revenues. The National Pacific Radio Trust (NiuFM and Radio 531 pi) is predominantly publicly funded, supplemented by commercial revenue.

As part of a review of mechanisms for setting the level of public funding for broadcasting to guide future budgetary priorities, a research report into international practice was completed[8].

Why is this issue important?

The proliferation of media services and fragmenting audiences presents both challenges and opportunities for public service broadcasting in New Zealand. If public service broadcasting content were to be made available across all platforms, new audiences may be reached or existing audiences gain greater value. However, as audiences continue to fragment, there is a risk that potential opportunities for public service broadcasting development and innovation could be overlooked, and that a decline in the effectiveness of public funding and the public value of public service broadcasting could occur as public funding is spread more thinly over a wider range of services.

The key challenge is how to maintain and enhance the impact and public value of public service broadcasting content in a digital environment. The mandate of the public broadcasting agencies and the level of funding available for public service broadcasting content must be sufficient to enable broadcasters to provide effective public services. Industry stakeholders recognise the continuing rationale and role for Public Service content in a digital broadcasting environment. At the same time, there is some question whether the current approach to public investment in broadcasting is having sufficient impact on New Zealand broadcasting markets (in creating public value) and/or bringing economic returns to New Zealand.

What regulatory response has been adopted by different regulators?

Public service broadcasters overseas are generally diversifying and building on their existing brand strength to take audiences onto new services and/or attract new audiences to digital platforms. However, this diversification must be supported by compelling content and a sustainable source of revenue.

In the UK, the promotion of public service broadcasting has been achieved traditionally through a mix of both a dedicated, non-commercial broadcaster (the BBC) and commercial broadcasters with some public service broadcasting requirements established in their broadcast licences. The regulatory response to the new challenges of protecting and promoting public service broadcasting in a digital age has included a biennial review of the public service broadcasting landscape by the independent regulator Ofcom. The regulator also employs measures to support universal access, such as 'must-carry' rules and codes on the management of the Electronic Programme Guides (EPGs) to ensure the consumers have access to and can find public service broadcasting content in a multi-channel world. Such measures are not, however, currently applied to mobile and online content.

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[8] *Mechanisms for Setting Broadcasting Funding Levels in OECD Countries* (Unitec/Ministry for Culture and Heritage 2005), available at http://www.mch.govt.nz/publications/broadcast-funding/index.html.

The need to ensure the accountability, sustainability and effectiveness of funding for public service broadcasting in a digital age has led a number of regulators to introduce greater contestability of funds on a model similar to that used in New Zealand. However, in most of these countries the level of funding for public broadcasters is higher and/or represents a significantly greater proportion of total broadcasting revenues than in New Zealand (especially in television and related audio-visual content). Consequently, where it is introduced, contestable funding tends to be limited to a supplementary funding stream for producers and non-public broadcasters. Local content or genre-specific quotas also remain a prominent feature across a number of overseas markets.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Review the impact of the current mix and level of funding for dedicated public service broadcasters and the provision of contestable funding.

Restructure (Approach B)

- Commission an independent body to monitor, review the definition and scope of, and promote the health of public service broadcasting in the light of digital technology (this could, for example, be a possible role for a converged regulator discussed in Section A on Cross Value-Chain Issues).
- Review alternative definitions of public service broadcasting in a digital age and consider the implications for the principle of universal access of different delivery platforms (some of which may include an element of conditional access).

Reform (Approach C)

- Strengthen public broadcasters to ensure the continued visibility and impact of local and public service content, plurality of news provision, and independence in an increasingly globalised media environment.

These options are neither exhaustive, nor mutually exclusive.

Question 5.6 Which of the options for supporting and promoting public service broadcasting in a digital age do you support, and why?

Question 5.7 Would a greater focus on the role of public broadcasters be a more effective means of ensuring the continued accessibility of public service content than spreading resources and content across numerous providers? If so, how might this be achieved?

Question 5.8 If an independent body were commissioned, what mechanisms might be needed to measure and monitor the quality and diversity of public service broadcasting in the digital age?

Question 5.9 As viewing patterns change with the proliferation of platforms, and access is often conditional (pay per view or subscription), what expectations should there be for the delivery of publicly-funded content through pay platforms?

ADVERTISING

Background: current regulatory situation in New Zealand

Regulation of advertising in New Zealand is largely left to the market, with no limits on the length and frequency of advertising on TV or radio. The exception is the advertising ban on free-to-air channels on Sunday mornings and designated public holidays. On matters of advertising standards, the Advertising Standards Authority (ASA), a self-regulatory authority, sets and upholds industry codes.

The self-regulation regarding issues which impact on wider public policy concerns – such as alcohol, food, and pharmaceutical advertising – has been considered by some to be an ineffective approach. In the case of alcohol advertising, the Review of Regulation of Alcohol Advertising published its report and recommendations concerning the regulation of alcohol across media in April 2007.[9] The Health Select Committee's Inquiry into Obesity and Type 2 Diabetes of August 2007 also makes recommendations on the regulation of food advertising across media.

Why is this issue important?

Advertising revenue plays a critical role in the health of any broadcasting market, and so regulation of media advertising is a key instrument. Advertising also operates in the wider public policy context and will inevitably continue to get drawn into public policy debates on issues such as gambling, public health and protection of minors.

The role of advertising has become more complex in a digital age, expanding far beyond traditional TV ad breaks. Sponsored programming, product placements, interactive advertising and advertising-funded programming, including 'advertainment', are all becoming an increasingly important part of the revenue mix.

[9] New Zealand Drug Foundation, *Alcohol advertising policy in New Zealand*, May 2006

In light of the increasingly competitive market, some stakeholders consider the Sunday advertising restrictions are no longer sustainable.

A number of stakeholders also note that, since current rules are very focused on traditional media, they may not sufficiently protect audiences from aggressive, misleading or potentially harmful advertising on non-broadcast platforms. This issue may become increasingly important, given that industry players expect the role of the advertising-funded model to increase across all media and to become increasingly sophisticated.

New platforms, such as internet protocol television (IPTV) and mobile TV, are frequently based on advertising models and compete with traditional broadcasters for finite advertising revenues. In the interests of fair competition and consumer protection, it is therefore important to ensure consistent standards across media, (for example with regard to the advertising of harmful products such as alcohol, tobacco, or gambling) but also to ensure that these standards can be implemented effectively.

What regulatory response has been adopted by different regulators?

The regulation of advertising overseas includes restrictions on the frequency and length of advertisements, controls on sponsorship and product placement and special protections around harmful products (such as tobacco and alcohol) or for specific audiences (such as children). There is a recent trend towards relaxation of advertising rules, largely in response to the increased competitive pressures of a digital environment. For example, in Europe the recently revised Television Without Frontiers Directive has liberalised rules on the frequency of advertising. Similarly, Canada's media regulator has decided to remove restrictions on broadcasters' advertising time limits.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Review the impact and value of rules on 'Sunday' advertising.

Restructure (Approach B)

- Strengthen standards regulation to extend to new digital media perhaps through introducing an element of co-regulation.

Reform (Approach C)

- Focus advertising rules on areas of public interest, on the grounds of health and safety. These areas might include specific rules for children's food and toys, alcohol, tobacco, pharmaceuticals, etc.

These options are neither exhaustive nor mutually exclusive. See also Section 4 dealing with options for amending the regulatory framework by establishing a converged or single regulator.

Question 5.10 Which of the above options for dealing with advertising issues in a digital age do you support? Please give reasons for your views.

(C) DISTRIBUTION ISSUES

This section is concerned with ensuring that content is reasonably available to the relevant network and platform operators and that monopolies in content supply are not created or entrenched. It focuses on measures aimed at improving competition, ensuring media plurality, protecting property rights, and delivering consumer benefits. Among the distribution issues, those emerging as particularly important for both policy-makers and industry include ensuring the availability of content to disadvantaged groups, access to content of significant public value (e.g. sports rights) and an effective rights regime for digital media.

Potential actions at points on the regulatory reform continuum

Examples of specific actions	(A) Updating Existing Arrangements	(B) Examples of restructuring the regime	(C) Examples of reform of the regime
Distribution	• Review and strengthen provisions promoting internet safety and guarding against 'the exploitation of minors • Review of options for dealing with orphan works (IP) • Extend some funded captioning to new platforms.	• Broker terms of trade agreement and / or code or practice to encourage FTA access / carriage across platforms • … and to ensure that content rights are made available to content providers in a fair manner • Adopt a range of measures to establish an orphan rights licensing regime (this could include Copyright Act Amendment) • Introduce minimum obligations on platform providers for technical access and capability for hearing/sight-impaired.	• Introduce measures to improve accessibility to content for all New Zealanders, e.g. o develop a formal open access regime that ensures that EPG, platform and network owners provide access to third parties on a fair and equitable basis and do not seek to use access to prevent or hinder competition o introduce 'must carry' (and potentially must offer and / or must pay) regulations for certain services o revise licence conditions for platform operators and consider the introduction of minimum obligations to carry a percentage of certain service types or genres (subject to GATS if appropriate) o review whether measures to control access to premium content are appropriate for New Zealand o Specifically, assess whether a limited anti-siphoning regime might be appropriate.

Access to Content: Disadvantaged Viewers

Background: current regulatory situation in New Zealand

In New Zealand, NZ On Air allocates funding to support access services (notably captioning services for the deaf and hearing impaired) but broadcasters are not subject to any mandatory obligations to provide such services.

Why is this issue important?

In the interests of equality of access, public policy should ensure that the digital transition takes account of the needs of audiences with disabilities, to prevent the emergence of a digital divide in which such audiences are disadvantaged.

What regulatory response has been adopted by different regulators?

Digital TV and Radio creates real opportunities for greater access and information. Some governments have extended duties on broadcasters to ensure services such as subtitling, audio and signing descriptions are included on cable, satellite and other digital platforms.

Advisory groups and consultations are also being used to develop and debate potential improvements to Electronic Programme Guides and other services to ensure that consumers with disabilities have equal access to information.

Examples of subtitling requirements are provided in the following table.

Examples in subtitling requirements across markets

UK	• BBC 1 is to increase the volume of its subtitled programming to 100% by 2008 • Other channels must also increase their subtitled output significantly e.g. all channels with >0.05% audience share must offer over 20% subtitling by 2010
France	• French programming currently carries comparatively little subtitling, but new regulatory targets have been established and the PSB TF1 is expected to subtitle 100% of its output by 2010
Netherlands	• The three PSB channels must increase their subtitling output to 100% by 2008. The six main commercial channels currently subtitle 2% or less, but must reach 100% by 2010
Ireland	• Major Irish channels are expected to reach a target of 90% by the end of 2007
Belgium	• VRT, the PSB, increased their subtitled output to 50% in 2006 and may increase this further in the future
Canada	• Major Canadian channels already subtitle 90% of their English-language programming. Smaller channels are also encouraged to work towards this target
USA	• The US has the highest regulatory obligations; in 2006, 100% of programmes produced after 1998 must had to be subtitled (with some exceptions)

Source: European Federation of Hard of Hearing People, Ofcom, CSA, CRTC, NCBI

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Extend limited funded captioning (sub-titled programmes for the deaf and hearing impaired) to new platforms.

Restructure (Approach B)

- Extend funding support to assist with the provision of audio-described television for visually impaired audiences.
- Introduce minimum requirements on broadcasters for technical access and capability for the hearing/sight-impaired.

Reform (Approach C)

- Assess the potential to regulate Electronic Programme Guides (EPGs) and other access services (subtitling) to ensure service accessibility for disadvantaged audiences (e.g. visually and hearing impaired).
- Conduct a wider review across all digital media platforms to ensure that the interests of disadvantaged groups are equally protected and promoted across platforms.

Question 6.1 Which of the above options for ensuring the accessibility of content for disadvantaged audiences do you support? Please give reasons for your views.

Question 6.2 If funded captioning of programmes was extended, should this cover all delivery platforms, or are some considered priorities?

Question 6.3 Should the option of introducing requirements on broadcasters and platform operators to provide some captioning be considered as an alternative, or in addition, to funding?

Question 6.4 Should funding and/or requirements be introduced to provide audio-described programmes for the blind or sight-impaired? If so, what would be the implications, in terms of technology and cost?

AVAILABILITY OF CONTENT: PREMIUM CONTENT AND SERVICES

Background: current regulatory situation in New Zealand

New Zealand currently has a 'light touch' approach to the regulation of copyright and content rights with no form of anti-siphoning law. An amendment to the Copyright Act 1994 was recently proposed to Parliament, with the intention of clarifying the application of existing rights and exceptions in the digital environment, to take account of international developments within a more technology-neutral framework.

Issues around content management rights in New Zealand have been highlighted as a key area of concern by stakeholders. A number of industry players are of the view that exclusive content rights deals are creating a critical bottleneck for investment.

Views on appropriate responses and suggested solutions vary considerably. Some stakeholders believe anti-siphoning rules would be desirable to protect events of national significance. Others consider rights issues should be left to the market to negotiate and that the introduction of anti-siphoning laws would undeservedly 'punish' certain parties, such as SKY and the sports sector, who have made considerable investment in New Zealand sports through rights acquisition.

Why is this issue important?

The rights to premium content can play a vital role in broadcasters winning audiences in an intensely competitive environment. However, broadcasters' attempts to secure exclusive rights to content have the potential to disadvantage the wider audience by limiting the availability of content considered to be of public value. There may also be a temptation for broadcasters to hoard rights, which may not benefit the effective operation and development of the wider market.

The fragmentation of audiences that ensues from a multi-channel, multi-platform environment creates a strong incentive for broadcasters to seek arrangements for their channels and services to be available and visible across all platforms. There are several ways in which access risks being frustrated: platform operators may seek exclusive deals with content providers; content providers may seek to achieve exclusivity in reverse; the terms of access to a platform's electronic programme guide could be onerous or unfair, or used as leverage for other commercial issues.

Vertical or horizontal integration can put content providers in a market-dominant position in relation to the acquisition of premium content. Access to premium content is critical to broadcasters and platform providers, and is usually achieved through long-term supply arrangements. The emergence of new platforms is likely to have an impact on both the definition of broadcast territories and the concept of transmission "windows".

What regulatory response has been adopted by different regulators?

The acquisition and sale of content rights is an area where regulators tend not to intervene heavily, treating the matter largely as one of commercial interest and therefore best developed under free market conditions. However, there are some specific areas where regulation has been used in order to protect and promote the public value associated with some content.

For instance, in Europe the Television Without Frontiers directive encourages member countries to draw up their own list of sporting and cultural events, such as a World Cup final or the inauguration of royalty, which are felt to be too important to be broadcast exclusively on pay-TV. The revised Television Without Frontiers directive also promotes universal access to the reporting of current events on a non-commercial basis, which means that any broadcaster or content provider may obtain the rights for short clips of key events free of charge.

An anti-siphoning scheme also exists in Australia to guarantee access to events of national importance and cultural significance on free-to-air television by giving priority to free-to-air television broadcasters in acquiring the broadcast rights to those events. This was deemed appropriate to protect the interests of the majority, as less than one in four households in Australia currently has access to pay television[10]. However, the regime is being loosened slowly and few markets are introducing or strengthening anti-siphoning regimes at this stage.

The possibility of abuse of a dominant position through the sale or acquisition of exclusive and/or bundled rights is also an issue that many regulators are reviewing closely. The issue is whether some behaviour in the rights market may be in breach of existing competition law or should be regulated more closely. However, there are currently few examples of direct intervention. Most competition authorities have adopted a broad market definition in respect of rights (e.g. 'the rights to premium sport' rather than 'the rights to English football'). In Europe, most markets allow the collective selling of rights by sports (notably football) leagues, deeming it to be in the national interest. However, those leagues have been forced to split their rights into several contestable packages to ensure that a broad range of distributors have the chance to secure rights.

Additional case study information on anti-siphoning regulations is provided in Annex Three of this paper.

What are some regulatory options?

In response to this, the policy-makers could:

- Maintain the status quo.

[10] DCITA (Department of Communications, Information Technology and the Arts, Australia)

Update Existing Arrangements (Approach A)

- Review whether the acquisition of exclusive rights has led or could lead to anti-competitive behaviour (by 'crowding out' competitors).
- Review whether major New Zealand rights vendors (especially sports) should face any regulations over the bundling of rights across platforms.

Restructure (Approach B)

- Facilitate brokered terms of trade or a code of practice to encourage access for, or carriage of, free-to-air services across platforms.
- Brokered terms of trade would ensure content rights are made available to content providers in a fair manner (e.g. "fair play" agreements for sports clips).

Reform (Approach C)

- Introduce licence conditions for platform operators and consider minimum obligations to carry a percentage of certain service types or genres.
- Introduce a limited anti-siphoning regime, in the form of:
    - requirement to offer rights in a non-discriminatory fashion, or
    - requirement to agree rights 'packages' with regulator (cf. UK)
    - requirement to offer a highlights package / extended highlights package / near-live offering to free-to-air, or
    - very limited / dual rights anti-siphoning list, where rights can be offered to both pay and free-to-air but neither can be exclusive.

Question 6.5 Which of the options for ensuring the availability of certain types of content and services across platforms do you support? Please give reasons for your views.

Question 6.6 If brokered terms of trade were developed, what should be their scope? What criteria might be relevant?

Question 6.7 If broadcasters or platform providers were required to carry a minimum percentage/amount of certain service types or genres, what services or genres should be prioritised? How would such a requirement be workable in a multi-channel environment?

Question 6.8 If some form of anti-siphoning were introduced, how might this be limited in the New Zealand environment? How might the effect on sports bodies be mitigated?

COPYRIGHT FRAMEWORK

Background: current regulatory situation in New Zealand

As outlined in Volume One of the report, New Zealand's Copyright legislation is currently under review after a period of public consultation. Copyright infringements are addressed principally through the New Zealand Courts.

Why is this issue important?

The digital environment enables consumers to use, copy, share and store content in a variety of new ways. These new activities create a challenge to the rights management framework, which must balance the interests of consumers against protecting right-holders and the commercial value of intellectual property. Infringements can also be harder to prove given the relative anonymity and global nature of the internet. The co-operation of both customers and industry players is therefore crucial in any copyright framework regime.

An effective copyright framework should also support market competition through protecting digital rights' value. If not addressed, infringement issues like piracy can have a profound, negative impact on the revenues of right-holders and emerging markets.

Industry stakeholders generally believe that copyright and intellectual property laws need to be reviewed regularly to ensure that the framework adequately responds to changes in consumer behaviour and technological developments.

What regulatory response has been adopted by different regulators?

In a number of countries, the regulator and industry players have taken steps to build awareness of copyright law issues among consumers. For example, most English-language DVDs have trailers advising viewers of copyright issues. However, breaches often and increasingly occur outside the jurisdiction of the country of origin, which makes regulating it more difficult. For instance, pirating activities carried out in China have a negative impact on the US content production market. To address this issue, the US Government monitors the countries with high copyright breaches and has brought a number of trade cases before the World Trade Organisation.

What are some regulatory options?

- Maintain the status quo.

Restructure (Approach B)

- Launch initiatives, aimed at increasing consumer understanding of the copyright framework (e.g. an educational website, government warnings with software products, advertising campaigns, school initiatives).

Reform (Approach C)

- Review stakeholders' perceptions of the existing copyright framework with regard to digital media and make subsequent amendments to the framework, if necessary (note: the legislation is currently under review).

Note that the option relating to consumer understanding could be pursued as part of the media literacy programme discussed earlier in the discussion paper (pages 20-21).

Question 6.9 Which of the options for dealing with consumer understanding of the copyright framework do you support? Please give reasons for your views.

Question 6.10 In addition to criminal penalties, do you favour a stronger role for the state in promoting media literacy as a means of promoting internet safety? What other interventions would be practical, given the overseas origin of much of the material in question?

Orphan Works

Background: current regulatory situation in New Zealand

'Orphan works' are defined as works under copyright, but for which the right-holders are impossible to find or cannot reasonably be found. In New Zealand, there are no specific regulations regarding orphan works.

Why is this issue important?

Due to the complexity, time and cost implied in gaining rights clearance on 'orphan' works, broadcasters and other content distributors may feel forced to abandon projects that include the use of such works. The problem is intensified as the value of sales to many digital platforms or channels may often be less than the cost of identifying and clearing rights. This represents a potential loss for the right-holders, broadcasters, and audiences.

Stakeholders, particularly those directly involved in content creation, acknowledge the challenge of establishing mechanisms for accessing and using orphan works in a manner that would not unnecessarily impact on other Intellectual Property Rights issues. There is a view that the resolution of orphan rights is especially important for supporting local content provision.

What regulatory response has been adopted by different regulators?

Canada has made an exemption for 'orphan' works in its Copyright Act by enabling the Copyright Board to grant non-exclusive licences. These licences are granted when the Board is satisfied that reasonable effort has been made to locate the owner, and in exchange for a fee paid to a copyright collective society. To date, the Canadian Copyright Board has granted 206 licences across a range of sectors, not just media-related[11].

In January 2006, the US Copyright Office released a report on 'orphan' works, concluding that legislative reform was necessary. However, when the Orphan Works Act of 2006 was introduced to Congress it was not taken up by the full House. The Bill would have allowed for more use of works for which the copyright holder cannot be found and limited liability for those who make a "reasonably diligent search" to find a copyright holder but are unable to. In January 2007, the US Ninth Circuit Court of Appeals rejected efforts to roll back federal laws that extended copyright protection in 1998 over orphan works, books and other media no longer in print.

In June 2007, a joint steering group of the International Federation of Library Associations and Institutions (IFLA) and the International Publishers' Association (IPA) agreed on key principles of access to orphan works. The statement sets out five principles to be followed by users of orphaned works. These are listed below.

- A reasonably diligent search should be undertaken to find the copyright owner.
- The user of an orphan work must provide a clear and adequate attribution to the copyright owner.
- If the copyright owner reappears, the owner should be reasonably remunerated or appropriate restitution should be made.
- If injunctive relief is available against the use of a previously orphaned work, the injunctive relief should take into account the creative efforts and investment made in good faith by the user of the work.
- The use of orphan works is non-exclusive.

To date, the regulatory position of 'orphan' works in the US remains relatively unclear, and indeed, the issue remains largely unsolved across the world.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Scope the problem, and review options for dealing with orphan works.
- Encourage industry to agree some principles on the approach and treatment of 'orphan' works.

[11] Canadian Copyright Board website, http://www.cb-cda.gc.ca/unlocatable/licences-e.html

Restructure (Approach B)

- Establish an orphan rights regime, possibly including a collection agency, for example based on the guidelines developed by the International Federation of Library Associations and Institutions (IFLA) and the International Publishers' Association (IPA).

Reform (Approach C)

- Support the orphan rights regime, once developed, with such changes to the Copyright Act as may be necessary.

Question 6.11 Which of the options for dealing with "orphan works" do you support? Please give reasons for your views.

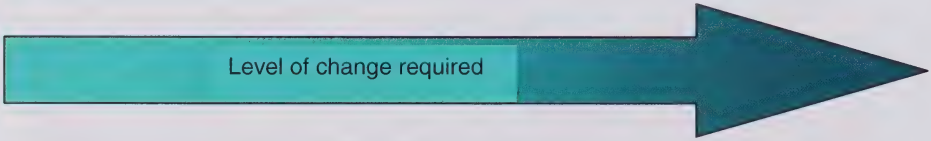
Question 6.12 Would the establishment of a collection agency as an aspect of the regime be workable in New Zealand?

(D) NETWORK ISSUES

This section is concerned with ensuring adequate competitive choice is available so that consumers can choose how, when, and at what cost they can access desired content. Digital gateways, such as platforms or networks offering services on a conditional access basis, can threaten media pluralism and fair competition. The control of these gateways may deny access to content or discriminate unfairly through pricing.

In networks, the major concerns are around the effective operation of competition across all platforms, regulation of technology standards and allocation of spectrum.

Potential actions at points on the regulatory reform continuum



Examples of specific actions	(A) Updating Existing Arrangements	(B) Examples of restructuring the regime	(C) Examples of reform of the regime
Networks	• Develop the post-ASO spectrum framework.	• Review and amend spectrum and multiplex management policy e.g. licensing of multiplexes / broadcaster spectrum to support / enforce distribution measures.	• Consider whether media 'stakeholders' should contribute towards a fund that ensures broad geographic service availability and / or whether build obligations should be placed on any (media) platforms (e.g. DTT / DVB-H / Broadband – similar in intent to the TSO telecoms framework) • Examine options to ensure sufficient investment in infrastructure (e.g. tax regime, PPP projects, etc. – consistent with the Telecoms Stocktake).

Open Access Regulation

Background: current regulatory situation in New Zealand

The New Zealand market is characterised by a few significant, dominant players in the broadcasting, pay-TV and telecommunications infrastructure markets. These are principally monitored and regulated through generic competition law.

Rules regarding access to the telecommunications network have been reformed recently under the amended Telecommunications Act. There is minimal regulation on broadcasting access, with the exception of the current provision under the Copyright Act – aiming to encourage investment in cable TV – which is currently under review.

Why is this issue important?

Digital gateways such as conditional access can threaten media pluralism and fair competition. The control of these gateways may deny access to content or discriminate unfairly through pricing.

A specific example of a new area for competition in access to broadcasting is electronic programme guides (EPGs). The ownership and operation of EPGs creates a powerful competitive tool. If EPG providers are also vertically integrated, they may be given incentive to discriminate in favour of their own services, particularly in cases where only one EPG is permitted per platform by the incumbent operator. Other service providers seeking access to the platform may therefore face refusal, unaffordable terms, or be offered unattractive slots on the EPG.

Some stakeholders stress that audiences should be at the heart of the government's developing policy on access controls. There is also a view that the regulatory framework should not give preference to any given technology or device but instead focus on issues of fair competition and consumer access.

What regulatory response has been adopted by different regulators?

In Europe, must-carry rules are widely applied to ensure that public broadcasting content is accessible to all viewers. The approach taken in Germany supports high levels of local programming by giving the state (rather than federal) government the authority to decide which channels must be carried by the broadcast networks. In the Netherlands, 'must-carry' rules specify that at least two local public service broadcasting channels must be carried by cable operators, one channel at provincial level and one at municipal level.

Many European markets also regulate access to EPG services. Rules are usually based around the following three key principles.

- Appropriate prominence – usually used to give free-to-air broadcasters and/or public service broadcasters a higher, more intuitive or otherwise preferential position.
- No undue discrimination – prevents a vertically-integrated EPG operator from discriminating in favour of in-house or sister channels.
- Fair, reasonable and non-discriminatory terms – transparent and open terms for setting positions.

Australia has proposed, and legislated for, an open access regime for its 'Channel B' auction, which is widely expected to be utilised for mobile TV. The Australian Competition and Consumer Commission (ACCC) also required a detailed open access undertaking by the pay-TV provider, FOXTEL, as part of its 'Content Sharing Agreement' signed with Optus.

A number of countries (the US, Canada, and member states of the European Union, for example) maintain regulations requiring certain platform providers to carry nominated services. This obligation to carry is usually applied to pay platforms (e.g. satellite or cable), and the nominated services tend to be small local channels or public service broadcasters. In Canada, a version of "must pay" regulation is applied: cable television and satellite operators must ensure that the majority of the broadcasting services are devoted to the distribution of Canadian programming services; and broadcasting distribution businesses with more than 2000 subscribers must contribute at least 5% of their gross annual broadcasting revenues to the creation and presentation of Canadian programming (see case study appended to this paper).

What are some regulatory options?

- Maintain the status quo.

Restructure (Approach B)

- Facilitate brokered terms of trade or a code of practice to encourage transparency and access for, or carriage of, free-to-air services across platforms (see also the regulatory options for ensuring availability of premium content on pages 34-36).

Reform (Approach C)

- Develop a formal open access regime that ensures that electronic programme guide, platform and network owners provide access to third parties on a fair and equitable basis and do not seek to use access to prevent or hinder competition, for example:
  - open access requirements for TV platforms (e.g. IPTV / satellite / terrestrial) regulating or requiring them to publish terms for platform access;
  - open access requirements for mobile TV licensees (as and when spectrum is auctioned).

- Introduce "must list" regulation to ensure fairness and transparency in the allocation of electronic programme guide positions.
- Introduce '*must carry*' (and potentially must offer, must list and / or must pay) regulations for certain services to ensure they are (a) available on certain digital (pay) platforms, and (b) that fair terms of access are agreed.

These options are non-exhaustive examples. Additional case study information on "*must carry*" regulations is included in Annex Three of this discussion paper.

Question 7.1 Which of the options for ensuring fair access for service providers to digital platforms do you support? Please give reasons for your views.

Question 7.2 If an open access regime was introduced to ensure fair access for service providers to digital platforms, what would be its scope? What sort of criteria should apply?

Question 7.3 If "must-carry" provisions were introduced, to which platforms would the obligations to carry services apply (e.g. all pay, cable, satellite, IPTV)? What services should qualify for must-carry status (e.g. public service broadcasters, regional channels)?

Question 7.4 Should "must pay" obligations be introduced, either in addition to, or instead of, "must-carry"? If so, how might this work? Which services would it apply to? Would the Canadian version of "must pay" be appropriate to New Zealand?

Question 7.5 If a "must list" requirement for electronic programme guides were introduced, should this be in addition to or as an alternative to "must-carry"? How would such a requirement work in a multi-platform and multi-channel environment?

TECHNOLOGY STANDARDS

Background: current regulatory situation in New Zealand

There are currently no legislative or regulatory requirements on technical standards: leading to a range being deployed and developed in New Zealand. One example is

in mobile telephony, where Telecom introduced CDMA technology, while Vodafone operates a GSM network.

Why is this issue important?

Proprietary equipment and competing platforms or providers with differing technical standards may result in consumers having to invest in a variety of equipment to access the full range of services they want. The consequence may be a slower than necessary transition to new platforms and technologies. This may, in turn, have consequences for the profitability of the wider market and the achievement of key digital objectives.

Stakeholder views differ on whether this issue of technical standards is a matter for the regulator, the industry or the market. However, there is consensus that the current situation could lead to increasingly proprietary standards and new bottlenecks emerging across the market.

What regulatory response has been adopted by different regulators?

Typically, regulators do not impose technical standards on industry players. One of the few examples of regulatory intervention is an initiative introduced by the French regulator, which requires digital terrestrial television (DTT) set-top boxes to be MPEG4 and high-definition (HDTV) compatible[12]. With increasing spectrum scarcity, however, other regulators have begun adopting the MPEG4 coding system for new launches or re-launches of the digital terrestrial television platform, to ensure the most efficient usage of available terrestrial spectrum.

Most regulators have remained technology-neutral on mobile TV, but the European Union recently stated that its preferred standard for mobile TV is DVB-H.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Encourage the industry to co-operate on technical standards in order to promote interoperability in the interests of consumers.

Reform (Approach C)

- Establish mandatory technical standards on certain networks for certain services or service components (e.g. DVB-H for Mobile TV or MPEG4 for digital terrestrial television encryption).

Question 7.6 Which of the options for ensuring minimum agreed technical standards do you support? Please give reasons for your views.

[12] For further detail please see the section on global regulatory approaches.

Question 7.7 Would the interests of audiences and industry be best served by industry-wide adoption of agreed technical standards?

Question 7.8 Is government encouragement sufficient to ensure industry-wide agreement is reached in New Zealand? If not, what other measures might be warranted?

SPECTRUM ALLOCATION

Background: current regulatory situation in New Zealand

While the final date for analogue switch-off in New Zealand has not yet been confirmed, the switch-off is expected to take place by 2015. A number of spectrum policy decisions were taken in 2006 (e.g. in relation to the return of VHF spectrum currently used for analogue television transmission). However, the government has not yet determined the post-analogue switch-off spectrum allocation regime.

Why is this issue important?

Spectrum capacity is a finite and valuable resource. Therefore, the allocation and management of the "digital dividend" (freed-up capacity after the switch-off) is critical in achieving both public policy outcomes for government and commercial outcomes for current or prospective spectrum licence holders. A number of industry players seek additional spectrum in order to introduce new products and services. For example, mobile players could be interested in obtaining spectrum for enhanced mobile TV services, while TV broadcasters could benefit from launching high definition television or enhancing their multi-channel proposition.

Many industry players believe that making decisions on the mechanisms and likely scenarios for allocating spectrum should be one of the highest priorities for the government in the short to medium term. Several are also concerned about the current lack of clarity on spectrum allocation policy post-analogue switch-off.

A number of stakeholders believe that allocating spectrum will become an increasingly high-risk issue as the government will have to speculate on the likely role and impact of competing new technologies.

What regulatory response has been adopted by different regulators?

By the end of 2006, only one country in the world had completed analogue switch-off: the Netherlands switched off its analogue signal in December 2006. Sweden is

due to complete the switch-over by the end of 2007, and analogue services have recently been switched off in the first region (Whitehaven) in the UK. There is, therefore, little precedent for international approaches to post-analogue switch-off spectrum management.

Many European authorities have started analysing their options, as analogue switch-off is due to occur for most within the next five years. No unified approach to spectrum allocation has emerged to date, and approaches vary from market-based to highly regulated. For example, in the UK Ofcom has stated that it favours a market-based auction where operators will have to compete to obtain spectrum, although this is still under review. In Germany, it is expected that the digital terrestrial television frequencies will be allocated by the Federal Network Agency after a tendering process. In Spain, UHF spectrum has been allocated already to digital terrestrial television and one multiplex has been reserved for mobile TV services. In the United States, there is a strong lobby towards 'national' licences to replace the patchwork of local licences preferred by the Federal Communications Commissioner in recent auctions.

The digital transition also requires a new approach to spectrum licensing regimes. In an analogue world, conditions were attached to a single licence that related to one broadcaster, but digital broadcast allows a number of channels and broadcasters to share a single licence. New approaches therefore include multiplex licensing or licences specific to a broadcaster.

What are some regulatory options?

Maintain the status quo

- Market-driven approach – making spectrum available to all interested parties via an auction – supplemented with reservation of spectrum for specific purposes (e.g. non-commercial, Māori, and public broadcasting).

Update Existing Arrangements (Approach A)

- Review existing spectrum management and allocation policies to ensure that future policies are appropriate to the transition to a converged digital environment, while maintaining the framework established by the Radiocommunications Act 1989.

Restructure (Approach B)

- Within the framework provided by the Radiocommunications Act 1989, either define types of services for which the spectrum should be used (e.g. certain capacity to high definition television, certain capacity to Mobile TV proposition) and auction the spectrum to the interested players; or allocate spectrum to specific players for specific purposes (e.g. extra capacity for launch of high definition television to a certain industry player); or some combination of these.

Reform (Approach C)

- Introduce a new licensing regime for broadcasters, multiplex and/or other platform operators to ensure compliance with any relevant regulatory measures (e.g. open access) implemented through the review.

Question 7.9 What principles and priorities do you consider should guide the development of a post-analogue switch-off spectrum allocation framework?

Question 7.10 If any new regulatory measures (such as an open access regime) were introduced, would the option of licensing broadcasters, multiplex and/or other platform operators be an appropriate means of monitoring compliance?

Investment Issues

Background: current regulatory situation in New Zealand

New Zealand currently has a relatively low level of intervention across the market – for example, levels of funding in public service broadcasting are low compared to other OECD countries.

It is widely recognised that successful digitisation of the wider market place (for both broadcasting and communications) will require investment in infrastructure. The copper network currently has significant bottlenecks at the user access level and New Zealand's backhaul capacity is also limited, despite progressive increases in bit-rates made possible by the DSL family of standards. The recent telecommunications regulatory reforms seek to address these challenges.

Why is this issue important?

Investment into digital services at points in the value chain could ensure development of a strong digital market in New Zealand. Conversely, if investment in media markets is insufficient, the consequences may include a reduction in local content production and innovation, as well as a decline in New Zealand's creative skills base and the sector's contribution to the New Zealand economy. This risk is heightened by the continuing proliferation of global digital content.

Lack of sufficient investment in infrastructure roll-out could result in the creation of a 'digital divide', e.g. between rural and urban areas, as service providers allocate scarce resources only to reaching densely populated and therefore lucrative areas. The standard of the digital services provided over the infrastructure (e.g. broadband,

IPTV, VoIP) also needs to be high, if New Zealand is to see an increase in uptake of its digital products and services.

Stakeholders' views on this issue tend to focus on investment in infrastructure, rather than in a wider range of digital products and services.

The high number of stakeholders highlighting the issue of investment in infrastructure indicates this is viewed as a top priority. Many see that the key challenge for the regulator is to procure sufficient infrastructure investment while maintaining effective competition. Stakeholders suggest that new digital services, such as broadband, have the potential to make a significant, positive impact on the New Zealand market, but only if infrastructure receives sufficient investment. At the same time, there is a view that willingness to pay and the potential value of returns on fibre investment are very uncertain currently.

What regulatory response has been adopted by different regulators?

International regulators are considering a range of measures to encourage continued investment in content production and innovation in their markets. Such measures as tax incentives or contestable public funding based on developing competition and markets are emerging as preferred options, compared to more traditional and potentially less sustainable options such as direct public funding and ex-ante regulatory tools including quotas and restrictive advertising rules (although these options remain a feature of the policy packages in a number of markets).

There are also a number of examples of regulators who have encouraged dominant players in the market to commit to investments that would further digital penetration in the market. For example, Ofcom and British Telecom developed a New Generation Network (NGN) strategy, whereby BT invests heavily into new infrastructure, which would ultimately result in better broadband and IPTV services. In other markets, local and city governments are investing directly in fibre to the home (FTTH) network construction.

What are some regulatory options?

- Maintain the status quo.

Update Existing Arrangements (Approach A)

- Review current levels of investment from all sources in broadcasting-related markets and assess their potential to impact further on New Zealand's economic transformation objective.

Restructure (Approach B)

- Establish a fund to ensure broad geographic service availability, financed by contributions from media stakeholders.
- Introduce new incentives (such as tax breaks) to encourage investment in New Zealand's content and communications infrastructure.

Reform (Approach C)

- Place build obligations on media platforms (such as digital terrestrial television, DMB or broadband) to meet specified reach objectives (similar in intent to the TSO for telecommunications).

- Examine options to ensure sufficient investment in infrastructure (such as through the tax regime or via public-private partnership projects), in a manner consistent with the Telecommunications Stocktake.

Question 7.11 Which of the options to encourage investment in digital content and infrastructure, and to ensure the digital broadcasting industries are yielding an optimal economic return to New Zealand, do you support? Please give reasons for your views.

Question 7.12 If government intervenes to encourage investment in infrastructure, how can it ensure that it does not make *de facto* technology choices that preclude innovation in other areas?

Question 7.13 If a "build" obligation were placed on media platforms to ensure a minimum roll-out, how could such a requirement best be designed (e.g. the provision of incentives to encourage cooperation)? To which networks should it apply?

Question 7.14 If a media-funded pool were established to ensure broad geographic service availability of networks, who should be levied, and how should such a fund be administered?

Finally…

The possible approaches and specific measures identified in this discussion paper are illustrative. There may be alternative measures or combinations of measures which would deal more effectively with the perceived threats to diversity of content and providers in the converging market in New Zealand.

Question 8.1 Are there any alternatives, beyond the illustrative measures identified in this discussion paper, that you would recommend policy-makers consider as mechanisms to deal with issues across the value chain, or under the headings of "content", "distribution" and "networks"?

Question 8.2 Are there any other general comments you would like to make about the digital broadcasting review of regulation?

CONSULTATION PROCESS

Submission instructions

Responses to this paper are invited from interested parties, and should be returned to the Ministry for Culture and Heritage by **Friday 4 April 2008**. Please respond to the numbered questions in the discussion paper.

The discussion paper and questions are available online at www.mch.govt.nz/publications/.

Emailed submissions are encouraged and should be emailed to:
broadcastingregulation@mch.govt.nz

Written submissions should be sent to:

Review of Regulation Discussion Paper
Broadcasting Unit
Ministry for Culture and Heritage
P O Box 5364
WELLINGTON

The Ministry for Culture and Heritage and the Ministry of Economic Development will arrange a series of meetings with stakeholders during the consultation period. Stakeholders will be advised of the meeting timetable, which will also be posted on the website www.mch.govt.nz.

Posting and Release of Submissions

The Ministry for Culture and Heritage may publish all written responses on the website www.mch.govt.nz. The Ministry will consider you to have consented to the publication of your response, unless clearly specified otherwise in your response.

Please clearly indicate in your written response if you do not wish your name to be published, including in any summary, in material the Ministry for Culture and Heritage or the Ministry of Economic Development may prepare for public release on responses received.

Please advise the Ministries of any objection to the release of any information contained in a written response to this document and, in particular, which parts should be withheld, together with the reasons for withholding them. The Ministries will take into account all such objections when responding to requests for information on written responses to this document under the Official Information Act 1982.

Ministry for Culture and Heritage
Ministry of Economic Development
January 2008

ANNEX ONE: GLOSSARY OF TERMS

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ADSL2+	Asymmetric Digital Subscriber Line: DSL technology enabling faster data transmission over copper telephone lines
ASA	Advertising Standards Authority
ASO	Analogue switch-off
BBC	British Broadcasting Corporation
BSA	Broadcasting Standards Authority
BT	British Telecom
CDMA	Code Division Multiple Access: cellular telephony technology used by Telecom NZ
DCITA	Department of Communications, Information Technology, and the Arts (Australia) [now Broadband, Communications and the Digital Economy]
DCMS	Department of Culture Media and Sports (UK)
DMB	Digital multi-media broadcast: digital radio transmission system for sending multi-media (radio, TV, data) to mobile devices
DSL	Digital Subscriber Line: family of technologies providing data transmission over telephone networks
DTH	Direct to Home (satellite transmission)
DTT	digital terrestrial transmission
DVB-H	digital video broadcasting – handheld (a technical specification)
EPG	electronic programme guide (for on-screen navigation of services)
EPL	English Premier League (football)
FCC	Federal Communications Commission: independent US agency responsible to Congress for interstate and international communications regulation
FTA	free-to-air
FTTH	Fibre to the home (high bandwidth fibre-optic cable delivered to homes)
GATS	General Agreement on Trade in Services (World Trade Organisation)
GSM	Global System for Mobile Communications: cellular telephony technology used by Vodafone
HDTV	High definition television (technology providing greater resolution than standard definition TV)
IPTV	Internet Protocol Television (digital television using internet protocol over a network, often delivered via broadband – may be a closed or open system)
ISP	Internet service provider
MCH	Ministry for Culture and Heritage
MED	Ministry of Economic Development
MPEG-4	International standard to compress audio and visual data, enabling the delivery of high definition television services
MTS	Māori Television Service

Multiplex	A piece of equipment enabling a number of separate television streams to be bundled together for transmission
NGN	Next Generation Network (developing technology which will entail a single network transporting all information and services using packets – similar to the internet)
NTIA	National Telecommunications and Information Administration (US President's principal adviser on telecommunications and information policy, part of Department of Commerce)
OECD	Organisation for Economic Cooperation and Development
Ofcom	Office of Communications (UK regulator)
PPP	public/private partnership (for investment in infrastructure projects)
PSB	Public Service Broadcasting, or public service broadcaster
RNZ	Radio New Zealand
STB	Set-top box or decoder to convert digital broadcast signals so they can be received by an analogue television set.
TMP	Te Māngai Pāho (Māori broadcasting funding agency)
TPK	Te Puni Kōkiri (Ministry of Māori Affairs)
TSO	Telecommunications Service Obligations (enables services – e.g. to rural areas – to supplement those that are commercially available)
TVWF	Television Without Frontiers (European Union directive)
UHF	Ultra-high frequency (band within the radio-spectrum with frequencies between 300 MHz and 3 GHz)
VoIP	Voice over internet protocol (internet or broadband telephony)

ANNEX TWO: CONVERGED AND SINGLE REGULATORS

As referenced in the body of the discussion paper, a number of countries have responded to the growing convergence between broadcasting, telecommunications and the internet by restructuring the regulatory framework to create a converged or single regulator (although the US has regulated both broadcasting and telecommunications through a converged agency – the Federal Communications Commission – since 1934).

The following tables provide additional background information and case studies on international examples of converged regulation.

Several countries have established an independent converged regulator. Single regulator

- In a number of countries, regulation of media markets has been consolidated under one regulator
  - powers have typically either been transferred from a Government Ministry or through the consolidation of previous regulatory structures (e.g. in UK, the Office of Communications Act 2002 simplified the structure and reduced the number of regulations from 5 to one)
- These markets have considered an independent converged regulator enablers
  - an objective view of the development of the sector, with less risk of being accused of taking decisions for political reasons
  - provision for a dedicated resource focused on media issues
  - stability and certainty to the sector about how it will be regulated

Examples of independent converged regulators

Market	Regulatory body	Status
Australia	Australian Communications and Media Authority	Independent converged regulator
UK	Office of Communications (Ofcom)	Independent converged regulator
US	Federal Communications Commission (FCC)	Independent converged regulator
Hong Kong	Broadcasting Authority	Independent regulator (plans to converge)

Source: Spectrum Value Partners analysis

Decisions would need to be taken on of the regulator globally, there is a great degree of variation

Roles and responsibilities

- More specifically, decision would need to be taken on what specific actions and duties would the regulator be responsible for, e.g.
  - should the new regulator be involved in licensing, like the Australian, the US and the UK regulators, or should this function remain with the government?
  - should access be the responsibility of the new regulator, like in the UK and other EU countries?

- The functions of regulators vary between countries, although content standards appear to be the core responsibility of a regulator
  - typically, the converged regulators are also responsible for spectrum management
  - similarly, the converged regulators tend to be responsible for regulating access to broadcasting facilities, which in the past was typically the responsibility of the telecoms regulator
  - some regulators also develop and enforce advertising regulations whilst it is the responsibility of independent industry bodies in other countries

Duties of broadcast regulators in different countries

	NZ	AUS	UK	Other EU	US	Hong Kong	Singapore
Converged regulator exists	×	✓	✓	✓	✓	×	×
Licensing	×	✓	✓	×	✓	✓	✓
Spectrum management	×	✓	✓	✓	×	×	×
Content standards	✓	✓	✓	✓	✓	✓	✓
Advertising	×	×	×	✓	✓	✓	✓
Access	×	×	✓	✓	×	×	✓

Source: ACMA and ACCC website, EU website, HKBA website, BSA and ComCom website, MDA website, Ofcom, CC and OFT website, FCC, DOJ and FTC website (Mar 07); Spectrum Value Partners analysis

In addition, it would need to be decided whether and how the regulator would be involved in competition issues

Roles for competition

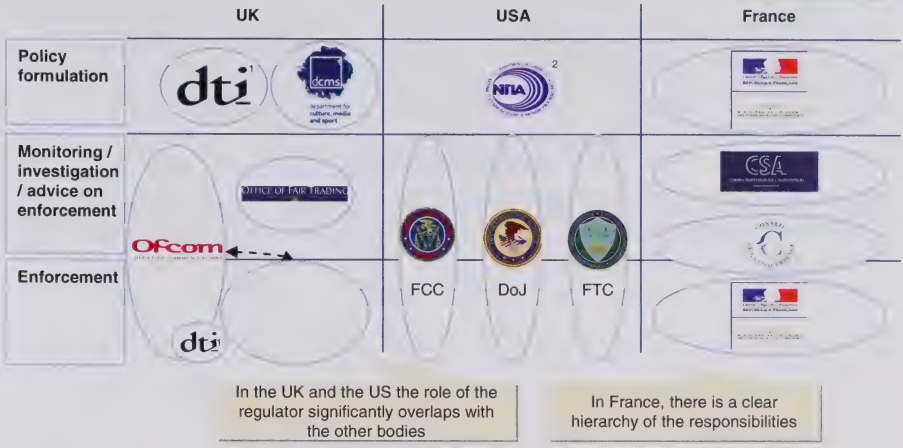
- In most of the countries, the converged regulator is also involved in the competition matters[1], although it is quite unusual for the regulator to be the ex-post competition authority for the sector:
  - it seems to be a standard practice for the regulator to be responsible for handling complaints and disputes, or at least there being a statutory requirement for consultation
  - however, involvement in broader competition issues, including M&A activity, and the degree of involvement, varies

- There are a number of issues for and against this involvement to consider:
  - a media-specific regulator would have the advantage of understanding the market in detail and having in-depth knowledge of the industry players
  - to supplement this knowledge, the regulator could then leverage power from more generalist competition authorities as required
  - however, involving regulator in the competition issues could result in confusion and / or overlap in respective roles and responsibilities of the regulator and the existing competition bodies; and
  - could diminish the role of the existing competition authority

Note: (1) See the detailed case studies of select geographies in the following pages
Source: ACMA and ACCC website, EU website, HKBA website, BSA and ComCom website, MDA website, Ofcom, CC and OFT website, FCC, DOJ and FTC website (Mar 07); Spectrum Value Partners analysis

In the UK, US and France the regulators are involved in competition issues, but the types of roles and interaction with other bodies vary

Responsibility for competition



Note: (1) Substituted by the Department for Business, Enterprise and Regulatory Reform on 28 June 2007
(2) National Telecommunications and Information Administration (NTIA) – part of the US Department of Commerce
Source: Spectrum Value Partners analysis

Case study: creation of a single regulator with competition responsibilities in the UK

Responsibility for competition

- "[The system] is complicated, but there is no ambiguity. The Acts are clear as to who has responsibility in each case" Ofcom

Ofcom

- **Ofcom** was created in 2003 as a regulator of UK communications industries, succeeding **five** organisations:
  - **Oftel (Office of Telecommunications)**, which was responsible for the telecommunications;
  - the **ITC (Independent Television Commission)**, responsible for television and broadcasters;
  - the **Radio Authority**, responsible for radio regulation;
  - the **Broadcasting Standards Commission**, responsible for content standards; and
  - the **Radiocommunications Agency**, responsible for radio spectrum administration
- As well as ex-ante telecoms regulator, Ofcom has the responsibility of an **ex-post competition authority**
  - this approach it delivers certainty for industry players and avoids any inconsistencies developing
  - in media, where much regulation is effectively ex-post, the system keeps Ofcom in charge
  - e.g., recently Ofcom has launched an investigation into the pay-TV market, in the wake of the dispute between Sky and Virgin Media, upon request from other broadcasters, incl. BT, Setanta, Top Up TV and Virgin

Other bodies, involved in competition issues

- The **Competition Commission** conducts **in-depth enquiries into mergers and markets upon reference** from another authority, e.g. the Secretary of State of the DTI, the OFT, of Ofcom. It cannot launch investigations itself
- The **OFT is the main competition authority**; however, in industry areas where there is a regulator, the regulators would take the lead. OFT can still investigate (esp. mergers), but **must take advice from Ofcom**
- The **Department of Trade and Industry (DTI)**[1] is responsible for the **policies** in the broadcasting sector related to "competition issues, management of the radio spectrum, legislation which affects the UK broadcasting industries, and technical standards"
- The **Department for Culture, Media and Sport (DCMS)** is responsible for **setting the policy framework** for the broadcasting sector, ensuring that the regulatory framework for broadcasting fosters fair and effective competition

Note: (1) Substituted by the Department for Business, Enterprise and Regulatory Reform on 28 June 2007
Source: Spectrum Value Partners analysis

Case study: overlap of responsibilities in the US

Responsibility for competition

- In the US, the telecoms regulation is not a federal power under the US Constitution. Consequently, telecom regulatory responsibilities are split between federal and state governments and across multiple agencies
- US telecommunication regulation is also a mix of general competition laws (such as anti-trust laws) and industry-specific regulation. For these reasons, the US regulatory framework is complex, with some inter-jurisdictional overlap and conflict

FCC – the regulator	DoJ and FTC	DoC and NTIA
• The **FCC** has the authority to approve the transfer of licenses (telecoms and media). It conducts a review of the rules and conditions of the transaction and may decide to approve or deny a merger. The FCC may impose restrictions and conditions. **The role of the FCC is sometimes overlapped by the Department of Justice**, which has the final authority in the ruling of acquisitions	• Further overlap is between the responsibilities of **Department of Justice (DoJ) and Federal Trade Commission (FTC):** the FTC and DOJ have concurrent jurisdiction over the review of transactions, although each has established expertise in certain industries or companies • Although both the FTC and DoJ **apply the same Merger Guidelines** and employ similar methodologies in investigations, procedural and substantive differences exist between the agencies today that can, in a few transactions, impact the outcome • In 2002, **the DoJ and FTC signed an agreement to avoid duplicated investigation** in which an investigation by one of the bodies commences only after clearance by the other body	• The **United States Department of Commerce (DoC)** is the Cabinet department of the United States government concerned with promoting economic growth. One of its operating units is NTIA • The **National Telecommunications and Information Administration** (NTIA) is the President's principal adviser on telecommunications and information policy issues; inter alia, NTIA manages and regulates the Federal use of spectrum

Source: Spectrum Value Partners analysis

Case study: a clear hierarchy of competition bodies in France

Responsibility for competition

CSA – the regulator	Competition Commission	Ministry
• The **Conseil Superieur de l'Audiovisuel (CSA)** is an independent administrative authority, responsible for regulating the audiovisual sector in France • It is responsible for managing and allocating spectrum for radio and television. Since July 2004, the regulation of radio and television services via alternative platforms (Internet, mobile networks) also falls under the CSA's remit. • CSA is in charge of **monitoring competition** in the French media market	• The **Conseil de la Concurrence** (Competition Commission) is an independent agency responsible for analysing and regulating market competition. • The Council **does not have the powers to restrict** unfair practices, and **serves only as an advisory board** to the Ministre de l'Économie, des Finances et de l'Industrie. • The 'Conceil de la Concurrence' **has to consult the CSA** on anti-competitive practises.	• The **Ministrie de lÉconomie, des Finances et de l'Industrie** (the Ministry of the Economy, Finance and Industry) is the **decision-making body** in the matters of competition. • The Ministry would **request Competition Commission's opinions** "on all competition matters, on parliamentary bills, on draft legislation regulating prices or restricting competition, and on matters relating to mergers" • However, **final decisions** relating to anti-competitive behaviour **are made by the Ministry**

Source: Spectrum Value Partners analysis

CASE STUDY: AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY (ACMA)

The Australian Communications and Media Authority (ACMA) is a statutory authority within the federal government portfolio of Communications, Information Technology and the Arts. It was formed on 1 July 2005 as a result of the merger of the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA). Its implementing legislation (the Australian Communications and Media Authority Act 2005) resulted in all the functions of the former ABA and ACA being transferred to ACMA. It is responsible for the regulation of broadcasting, the internet, radio-communications and telecommunications. ACMA's specific responsibilities include:

- managing access to radiofrequency spectrum bands, through radio-communications licence arrangements, and resolving competing demands for spectrum through price-based allocation methods
- planning the availability of segments of spectrum bands used by broadcasting services, and managing access to spectrum through broadcasting licences
- regulating compliance with relevant legislation, licence conditions, codes of practice, standards, service guarantees and other safeguards
- promoting and facilitating industry self-regulation
- exercising powers, where necessary to create delegated legislation (e.g. for content standards or service provider rules)
- facilitating the provision of community information to promote informed decisions about communications products and services
- reporting on matters relating to the communications industry, including its performance.

ACMA has, specifically, been involved in ensuring the operation of equipment with Australian standards; examining network security and integrity (especially around Spam, viruses and "malware" – software designed to infiltrate or damage a computer system without the owner's informed consent), and implementing internet safety programmes.

While ACMA began with a "silo" organisational structure (broadcasting, telecommunications etc), it is now structured around industry "inputs" (spectrum allocations, planning, pricing/policy and regulation/compliance – including licensing and technical standards) and industry "outputs" (industry performance, converging services, codes, content standards and education/consumer issues). Three Authority members (including the Chair and Deputy Chair) are full-time. ACMA employs 500 staff, and has three central offices (Sydney, Melbourne and Canberra), plus various regional offices.

ANNEX THREE: REGULATION OF CONTENT DISTRIBUTION

As referenced in the body of the Discussion Paper, a number of countries have measures in place to regulate the distribution of broadcasting-like content. Two of the most common measures to ensure platform providers do not use a dominant market position to deny access of services to their platform, or to retain exclusive rights to premium content, are "must carry" obligations and anti-siphoning requirements.

The following tables provide additional information on measures adopted in various markets to ensure open access to platforms.

In most countries, 'must-carry' obligations exist, while must-list obligations, requiring listing on EPGs, are less common

Open access and must-carry

- 'Must-carry' obligations typically specific certain channels and / or programmes that must be broadcast by certain types of broadcasters or network owners. They are imposed to ensure that a channel has fair access to a particular important network or platform
  - broadcasters subject to 'must-carry' obligations are usually those with greatest reach (e.g. PSBs, FTA broadcasters or pay TV broadcasters of a certain size)
  - must-carry channels are usually FTA channels (e.g. pay TV broadcasters must carry all FTA channels in Singapore; same in the UK)
  - "must-carry" may include broadcast quotas and / or scheduling restrictions
  - however, may only involve general obligations to contribute to an adequate and comprehensive range of broadcasting services within their respective licence areas (e.g. Australia)
  - applicable in the EU, HK, Singapore, the UK and the US
- 'Must-list' obligations typically refer to specific restrictions and requirements on information provided in an electronic programme guide (EPG) of an operator. They are designed to ensure a channel has 'fair' visibility and access to an operators channel listing method
  - the restrictions may be in relation to equivalent treatment and / or prominence of programmes broadcast by the EPG provider and other broadcasters
  - the required information may be in relation to programmes broadcast by PSBs or commercial FTA broadcasters
  - applicable in Australia, the UK and the US

Examples of must-carry and must-list obligations

Hong Kong	• Domestic FTA TV and radio broadcasters are subject to must-carry obligations under their licence conditions on news, documentary, current affair, arts and culture programmes and programmes for children, young persons and senior citizens.
United Kingdom	• The Communications Act **empowers the regulator to set must-carry obligations**; currently terrestrial transmission networks provided by NTL and Crown Castle must broadcast the digital services of all FTA channels in the UK • Must-list obligations include the requirement that **EPG providers give appropriate prominence to the listing and promotion of PSB channels.**
United States	• Cable operators with more than 12 channels are subject to must-carry obligations under the Communications Act: must broadcast a certain number of local commercial TV stations, non-commercial educational stations and a certain percentage of unaffiliated commercial programming • Satellite broadcasters must dedicate between 4% and 7% of channel capacity for non-commercial educational or informational programmes.

Source: ACMA website, EU website, HKBA website, BSA website, MDA website, Ofcom website, FCC website (Mar 07); Spectrum Value Partners analysis

Open access has been mandated in the UK and Australia, but with different results, due to differences in terms, capacity and economics

Lack of open access to the dominant platform could distort the operation of the free market

	Regulation	Impact
Sky	• Sky in the UK offers technical platform services e.g. conditional access, EPG listings, regionalisation services and access controls associated with interactive TV on a '**fair, reasonable and non-discriminatory basis**' - any operator can launch their channels on the Sky platform and can obtain an EPG listing - in reality, Sky has the flexibility to negotiate favourable commercial terms with individual providers; Ofcom is proposing a fixed charging structure for technical platform - Costs to access platform range from between £100k and £4m pa (due to regionalisation charges). A small channel pays 300k to 500k pa • There are no significant capacity issues in the UK	• There are now **over 300 channels** on the Sky platform in the UK • All the channels have negotiated terms based upon EPG listing charges and platform contribution charges
FOXTEL	• Foxtel in Australia is committed to ensuring an 'open access' regime for channel providers and infrastructure operators on **fair, commercial terms** on their digital platform. The costs of access should be shared equitably between Foxtel and each access seeker • The ACCC (competition commission) is available for arbitration only • The ACCC has developed a detailed open access cost model • Whilst the costs of access to the Foxtel platform is not publicly available, it is thought to be in the region of $1m pa. Additionally channels have to secure capacity on the satellite	• There are **only 2 new channels** which have secured access to the Foxtel platform as a result of mandated open access. Foxtel still **only has 100 channels** • This is likely to increase as platform continues to grow in size, though it would indicate that open access terms are overly onerous

Source: Spectrum Value Partners analysis

Internationally, platform operators are often obliged to carry certain channels on their networks by 'must-carry' regulations

Must carry

- In Europe, the Universal Service Directive recognises the ability of Member States to impose or maintain reasonable must-carry rules on network providers under their jurisdiction
  - article 31 aims to ensure that these rules are proportionate, transparent, and limited to what is necessary
- In most cases, as illustrated below, must-carry rules are not limited to Public Service Broadcasters only
- Typically, 'must-carry' regulations are applied at the national level, though there are notable exceptions
  - in Belgium, the must-carry rules are developed by regional authorities, separately for Flanders, Wallonia and Brussels
  - in Germany, must-carry regulations are developed on the State (Land), rather than Federal, level

Type of channels outlined in the 'must-carry' regulations for cable carriers

Channels	Netherlands	Spain	UK	Germany	France	Belgium
National Public	Y	Y	Y	Y	Y	Y
National Private	N	Y	Y	can be included by local regulator	Y	Y
Local Public	Y	Y	Y	Y	Y	Y

In deciding appropriate must-carry measures, New Zealand would have to decide
- what services should qualify for must-carry rules
-who would be able to nominate the must-carry services
-whether there are also 'must-pay' rules

Source: Spectrum Value Partners analysis

Free carriage for 'must-carry' channels is specified in a number of countries within the regulatory framework

Must carry

All must-carry channels have to be carried free-of-charge

- In the **Netherlands** and **France**, the regulations require the operators to carry the 'must-carry' channels for free
  - in France, cable operators must carry five channels (2 commercial and 3 public) on analogue free of charge; DTH operators must provide retransmission of the public channels and the European FTA cultural channel and **bear the costs** associated with the retransmission, including transport and broadcasting (e.g. cost of satellite transponder capacity)
  - in the Netherlands, cable operators have to carry seven must-carry programmes free of charge

Some must-carry channels have to be carried free-of-charge

- In **Belgium**, programmes of local public-interest broadcasters of the Flemish community (one per locality) must be carried without payment
- In **Germany**, the Open Channels for local community events have to be carried free-of-charge

Source: Spectrum Value Partners analysis

It is unusual for platform operators to pay national channel providers for their content

Must carry / Must pay?

Overview of commercial arrangements for carriage of national public and leading commercial channels

Country	Type of FTA channel	Channel pays	No one pays	Cable operator pays
Netherlands (cable)	Public (NOS)		Y	
	Commercial (RTL, SBS)		Y	
Spain (cable)	Public (RTVE)		Y	
	Commercial (Antena3, Tele5, non-encrypted programmes of Canal+)		Y	
UK (cable[1])	Public (BBC)		Y	
	Commercial (ITV1, Five)		Y	
Germany (cable)	Public (ARD)	Y		
	Commercial (RTL, ProSiebenSat1)	Y		
France (cable & DTH)	Public (France Télévisions, arte)		Y	
	Commercial (TF1, M6, Canal+[1])		Y	

Note: (1) In the UK, satellite operator Sky was charging the major FTA channels, ITV and BBC, for the carriage; however, in the UK, DTH platform is not subject to "must-carry" rules

Source: Spectrum Value Partners analysis

Canada is the only country reviewed where network operators 'must pay' for 'must carry' content – but this payment does not go to the channels

Must carry / Must pay?

General rules	• Cable television and satellite operators must ensure that the majority of the broadcasting services are devoted to the distribution of Canadian programming services • Broadcasting distribution undertaking with more than 2000 subscribers **must contribute at least 5% of their gross annual broadcasting revenues to the creation and presentation of Canadian programming**
Cable operators	• Cable television operators must carry programmes of the public broadcaster, local and regional stations and educational programmes, as well as some local programming • With the exception of small cable companies, all broadcasting distribution undertakings must contribute a minimum of **5% of their gross annual revenues** derived from broadcasting activities to contribute to the creation and presentation of Canadian programming. The CRTC also provides incentives to cable companies so that a portion of the 5% contribution can be devoted to the production of 'local' expression for the communities they serve
Satellite (DTH) operators	• Satellite operators must carry programmes of the public broadcaster and of at least one affiliate of each national television networks licensed on a national basis, as well as some local programming • DTH distributors must allocate the entire 5% programming contribution to **an independently-administered production fund**

There is also an ongoing debate in South Africa, whether 'must carry / must pay' rules should be introduced

Source: Spectrum Value Partners analysis; The Australian Film Commission, REVIEW OF AUSTRALIAN CONTENT ON SUBSCRIPTION TELEVISION, 2003

The two following exhibits provide background information on the types of regulatory measures used to ensure access to premium content (such as key sporting events or movies) is not exclusive to dominant platform operators.

Outside of NZ, the regulation of premium content generates significant policy debate, with a range of regulatory approaches adopted

Premium content

Examples of Regulatory Interventions in Premium Content

Intervention	Description	Examples
Non Exclusivity	• Restrictions on rights holders selling to a single buyer / selling a single package	• **UK** – EU forced breakup of FA Premier League rights into 6 packages • **Italy** – Sky Italia forced to give up exclusive rights to Serie A football as condition of merger
Distribution rights / wholesaling	• Obligation to wholesale premium and basic channels to other pay TV operators	• **UK** – BSkyB obliged to wholesale premium channels on retail minus price basis • **Italy** – Sky Italia must make premium and basic channels available to rival operators
Limit on contract terms	• Limit contract lengths for sport and movies rights to allow other operators opportunities to enter market	• **Spain/UK** – Length of contracts must not exceed 3 years • **Italy** – Movie output deal contracts reduced in length
Restrictions on bundled contracts	• Operators prohibited from locking up rights which they do not intend to use	• **Italy** – Legge Delega will prohibit exclusive purchase of rights to platforms which the buyer does not operate • **Australia** – New 'use it or lose it' legislation introduced
Platform specific	• Operators only permitted to hold exclusive rights on their own platform	• **Italy** – Sky Italia prohibited from owning exclusive rights beyond DTH
Option to terminate	• Rights owners have option to terminate distribution agreements without penalties	• **Italy** – Rights owner can unilaterally terminate (without penalties) their ongoing contracts with Sky Italia
Listed events	• Regulator lists key sporting events which must be shown FTA	• **Australia** – Anti-siphoning legislation gives FTA operators first refusal on 11 key sports • **Spain** – Key sporting events must be shown FTA e.g. La Liga • **UK** – Events such as Olympics and World Cup must be shown FTA

Source: Spectrum Value Partners analysis

Case Study: Regulating for non-exclusivity of premium rights

Premium content

- BSkyB's 13 year monopoly of Premier League football rights has been a key driver of pay-TV take-up
- The European Commission announced a probe into the FAPL auction in 2001 to investigate breaches of competition law
  - in 2003, the FAPL auctioned 4 tiered packages to enable rival bids, but all were acquired by BSkyB, with a highest bid of $1.024bn. BSkyB then offered to sub-licence 8 games but no party matched the reserve price agreed by BSkyB and the EC
  - the Commission remained unhappy and for the 2007-10 rights, following extensive negotiations with the European Commission, new rules were agreed. The FAPL sold the rights in 6 packages of 23 games each; **no one party could win all six**. Setanta acquired 2 of these, effectively ending Sky's monopoly over rights
- This season …
  - consumers can watch live FAPL matches on the Setanta sports channel for £9.99 per month on Virgin Media, Top Up TV and BT Vision as well as BSkyB
  - By comparison, to access FAPL on BSkyB the minimum subscription fee is £34.00 per month (as it can only be accessed when bundled with other channels)

Case study – EU breaking up FAPL

Source: Spectrum Value Partners analysis; TV Sports markets, press reports, company websites

Ministry of Economic Development
Manatū Ōhanga

TE MANATŪ TAONGA
MINISTRY FOR CULTURE & HERITAGE

ANNEX FOUR: REVIEW OF REGULATION FOR DIGITAL BROADCASTING: TERMS OF REFERENCE

Background

1. In May 2006 Cabinet made a number of decisions to support the launch of and transition to free-to-air digital television (DTV), with the objective of eventually switching off analogue transmission signals.

2. In making these decisions, it was noted that the transition to DTV represents a significant change to broadcasting infrastructure, and that it would alter the competitive relationship amongst free-to-air broadcasters, and between pay and free-to-air operators.

3. It was also noted that the launch of the Freeview DTV platform was a first step, enabling free-to-air broadcasters to participate as multi-channel operators in a multi-platform environment. A significant feature of the emerging media environment is the opportunity for convergence between broadcasting, telecommunications (fixed and mobile) and the internet. In addition, other sectors such as print media are expanding their on-line presence to encompass sound recordings and video clips. One consequence of this appears to be a re-positioning of businesses to focus on either content creation (commissioning, producing and packaging) or content delivery (e.g. as a platform provider), rather than divisions in business structures being made on the basis of the mechanism for the delivery of content.

4. As players in each sector – broadcasters, print media, telecommunications operators – experience a reduction in consumption of their core services with the proliferation of platforms and services, they are seeking to expand and diversify revenue generating activities through the exploitation of audio-visual content. The landscape of business models is becoming more complex and interwoven as a consequence.

5. In many countries around the world, including New Zealand, there have traditionally been separate regulatory policies for broadcasting, film, telecommunications and the internet. This is, however, starting to change, with the development of new legislation and re-structured regulatory bodies, such as the Office of Communications (Ofcom) in the UK and the Australian Communications and Media Authority (ACMA). Australia has also instigated changes to its cross-

media ownership regulations, in part as a response to the blurring of boundaries between the different segments of print, radio and television media.

6. The broadcasting sector has traditionally been shaped by the fact that spectrum was a scarce resource, implying a high cost of entry and leading to market concentration. Digital broadcasting and the emergence of new delivery mechanisms, such as broadband, now mean spectrum scarcity is much less of an issue. While this barrier to entry to the market has been overcome, however, new competitive tools are emerging, and convergence could result in different forms of market concentration through either vertical or horizontal integration and through the mechanisms and devices used to interface with audiences – including the dependence of internet services on telephone line provision in many cases.

7. In light of the changes implied by digital broadcasting, Cabinet authorised a review of the current regulatory settings, using a combination of research and stakeholder consultation. This paper sets out the terms of reference for the review.

Overall Approach

8. The approach to be taken in conducting this review of regulation will be:

a) Analysis and Research: a summary of the current regulatory settings applicable to the broadcasting, telecommunications and internet spheres, with an identification of relevant issues affecting competition, standards and rights. A brief review of past regulatory approaches. An analysis of key trends and patterns of investment and innovation. International comparisons of regulatory policy frameworks and trends in the light of technology developments in broadcasting and changing consumer behaviour. Prospects and scenarios for broadcasting in a multi-platform, converged future.

b) Consultation: Outcome of the research project to provide a starting point for a discussion paper with questions for consideration. Documents to be published and submissions invited. A full opportunity for consultation with key stakeholders representing (for example) broadcaster, telecommunications, production, transmission and consumer interests.

c) Report and Recommendations: preparation of a report summarising the results of the consultation process, the findings of independent research, and proposing a recommended approach for government consideration.

Scope and Purpose of the Review

9. The review will take broadcasting policy as its starting point, and will address issues under the broad headings of competition law, standards and copyright. It will also, however, consider the implications for regulatory policy of the convergence between broadcasting, telecommunications and the internet.

10. There is work underway in several related areas, such as the Telecommunications Stocktake, the Digital Strategy, the Digital Content Strategy and the Public Broadcasting Programme of Action (priorities 5 and 6, for example, address the roles of the BSA and NZ On Air in a digital context). This review of regulation will therefore be coordinated and aligned with these related initiatives.

11. The review will be managed by the Ministry for Culture and Heritage, as the lead department on digital broadcasting matters. It will be undertaken in close coordination with the Ministry of Economic Development, which has responsibility for competition policy, telecommunications, Information Technology policy, standards issues and the Digital Strategy.

12. The review will not be undertaken with any implied intention to make changes to the current settings, and there may well be issues for which industry self-regulation or cooperation will provide the best solution.

13. The review will principally address competition, standards and intellectual property rights issues at the three main stages of the broadcasting value chain: content, distribution and networks.

14. The issues for consideration at these three main stages will fall under the following broad headings:

(a) Content: broadcasting standards (taking into account work already underway in conjunction with the BSA, looking at the future of content regulation); levels and diversity of local content.

(b) Distribution of Content: availability of content across delivery platforms; intellectual property rights in content; acquisition of content; accessibility of public service and publicly funded content; availability of premium content such as broadcast sport events.

(c) Networks: access to spectrum or multiplexers; access to telecommunications networks; terms of access to platforms; technical and equipment standards; local operators (e.g. private transmission sites); transmission networks.

15. The industry sectors involved in digital broadcasting, either as their core business, or through complementary service offerings, are living through a time of significant and rapid change. The review will therefore look at three tiers of issues thereby using multiple frameworks, as indicated in the preceding paragraph:

- Short-term (tier one): those that are relevant to the broadcasting, telecommunications, internet and print media markets that now exist within New Zealand, and can therefore be viewed as priorities for consideration;
- Medium-term (tier two): those that are emerging through developments in these sectors that have occurred in other markets, and that are likely to occur in New Zealand (such as IPTV);

- Longer-term (tier three): those that might arise in the future, but cannot be confidently predicted now. Such issues might imply that the ground should be prepared for a different approach to regulatory issues, seeking consistent policies at key points in the value chain across the wider broadcasting, media and communications market.

Market Definitions

16. As indicated in the background section of this paper, developments in the media and communications sectors are resulting in complex business models and relationships, and increased blurring between what have traditionally been perceived as separate markets. The review will map out the current range of and relationships between delivery platforms and participants in the value chain. This exercise of market definition is likely to provide guidance on the extent to which it might be appropriate to consider a regulatory approach at points on the value chain rather than the more traditional vertical industry perspective. The aim of such an approach would be to ensure New Zealand is well-positioned to manage the longer-term "tier three" issues that may be on the horizon, but whose implications are not yet discernible.

17. The activities at the various points of the value chain are summarised below.

(a) Delivery platforms or media:

- Print;
- Radio;
- Free-to-air television (linear, multi-channel, SD or HDTV) via DTT, DTH or wired network;
- Pay (conditional access) television (linear, multi-channel, SD or HDTV) via DTH, wired networks or DTT;
- Internet (websites, streamed, down-loadable content, gaming, podcasting)
- Telephony (fixed line, mobile);
- Broadband IPTV (VoD).

(b) Value Chain:

Content creation

- Content producer/provider (e.g. Independent producer, studio, broadcaster, newspaper), with revenue generation from commissioning fees, investment, royalties, licensing fees);
- Content aggregator (e.g. broadcaster, aggregated channel such as "Living Channel");
- Content packager (e.g. broadcaster, packaged programme);

Access/Delivery

- Content distributor (e.g. broadcaster, transmission provider);
- Platform provider (e.g. SKY, Freeview, Vodafone);
- Device (TV, radio, PC, mobile phone, PDA);
- Consumer (note also the growth of user-generated content).

Research Project

18. To support the terms of reference for the review, and to provide a starting point for the planned consultation process, the Ministry for Culture and Heritage and the Ministry of Economic Development have commenced the preliminary research project outlined above. It will take the form of a brief review of past and current regulatory approaches within New Zealand. It will include an analysis of key trends and patterns of investment and innovation, along with international comparisons of regulatory policy frameworks and trends, in the light of technology developments in broadcasting and changing consumer behaviour. Finally, it will consider the prospects and possible scenarios for broadcasting in a multi-platform, converged future.

19. The report will then identify key issues for consideration in New Zealand, against the background of the specific circumstances of this market. It may include possible approaches for consideration by government, and for comment by stakeholders.

Timing and Process

i. Research project commissioned: April 2007, for delivery by end of June 2007.

ii. Public Consultation on basis of research and an options paper: September to November 2007.

iii. Ministers of Broadcasting and Communications report to Cabinet with recommendations: December 2007.